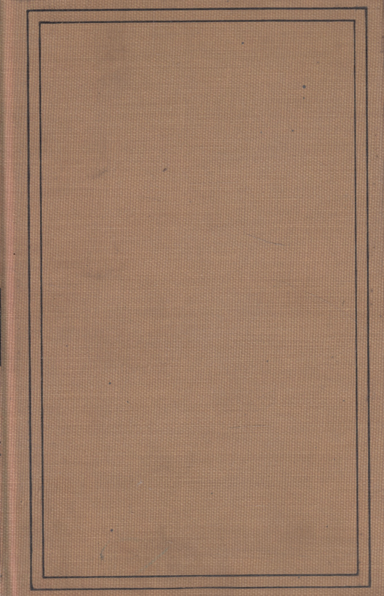








CASES DECIDED

IN

THE COURT OF CLAIMS

OF

THE UNITED STATES

OCTOBER 1, 1943, TO JANUARY 31, 1944

WITH

REPORT OF DECISIONS OF THE SUPREME COURT IN COURT OF CLAIMS CASES

REPORTED BY

JAMES A. HOYT

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* Deceased, November 1, 1943.

[1] On military leave, as of November 2, 1942; lieutenant commander, U. S. Naval Reserves, on active duty.

[2] On leave as of September 22, 1943, with War Food Administration.

[3] Appointed November 17, 1943, vice C. William Ramseyer, deceased. Mr. Thompson took the oath of office and entered upon the duties thereof December 1, 1943.

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ORDER OF THE COURT RELATING TO THE DEATH OF COMMISSIONER RAMSEYER

From the Journal of the Court, November 2, 1943:

"Mr. Ramseyer, who has been a faithful, esteemed and able commissioner of this court for over 10 years, died yesterday, as a result of a heart attack while at his post of duty. Out of respect to the memory of Commissioner Ramseyer the court will stand adjourned to 10 o'clock tomorrow morning."



CASES DECIDED

IN

THE COURT OF CLAIMS

October 1, 1943, to January 31, 1944, and other cases not heretofore published.

WINNEBAGO TRIBE OF INDIANS v. THE UNITED STATES

[No. M-421. Decided October 5, 1942]

On the Proofs

Indian claims; liability of United States for taking Indian property.—Where reservation was taken by the United States and Indians were given another in exchange, it is *held* defendant is not liable in a suit for just compensation where Congress has acted for what in its opinion was for the best interests of the Indians and has not expressly conferred jurisdiction on the Court of Claims to determine whether or not just compensation was paid for reservation taken. *Sioux Tribe of Indians* v. *United States*, No. C-531-(7), 97 C. Cls. 613; certiorari denied, 318 U. S. 789.

The Reporter's statement of the case:

Mr. Ralph H. Case for the plaintiff.

Mr. George T. Stormont, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the defendant. *Mr. Raymond T. Nagle* was on the brief.

The court made special findings of fact as follows:

1. This suit is brought under the jurisdictional Act of December 17, 1928 (45 Stat. 1027), which confers jurisdiction on this court "to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of the treaty of February 27, 1855 (Tenth Statutes, page 1172), and the Act of February 21, 1863 (Twelfth Statutes, page 658), or arising under or growing

out of any subsequent Act of Congress, Executive Order, or treaty which said Winnebago Tribe of Indians, or any band thereof, may have against the United States * * *."

2. By a treaty with the United States dated February 27, 1855 (10 Stat. 1172) the plaintiff tribe ceded to the United States the reservation then occupied by it in the territory of Minnesota and, in partial consideration for the cession, was granted, as a permanent home, a tract of land equal to eighteen miles square on the Blue Earth River in Minnesota territory, this tract to be selected by an agent for the Government and a delegation of Winnebagoes immediately after the ratification of the treaty. The treaty provided: "* * * and the country thus selected shall be the permanent home of the said Indians."

The treaty was ratified on March 3, 1855. The selection of the new home was made promptly thereafter, and the Indians removed thereto in due course.

3. Not long after their removal to this reservation it appeared both to them and to the defendant that their interest would be served best by selling a portion of the reservation not needed by them, and by establishing with the proceeds of the sale a fund which it was hoped would make them independent and self-sustaining. A treaty to accomplish this was entered into April 15, 1859 (12 Stat. 1101). The plaintiffs retained 104,958.8 acres, which it was provided should be assigned in severalty to the heads of families and unmarried males of 18 years and upwards, and these lands were later so assigned. The balance of their land, 99,366.51 acres, was sold eventually at prices ranging from 80 cents to $1.25 an acre, the proceeds of which were devoted to the benefit of plaintiffs.

Article IV of said treaty provided:

> * * * And, in order to render unnecessary any further treaty engagements or arrangements hereafter with the United States, it is hereby agreed and stipulated that the President, with the assent of Congress, shall have full power to modify or change any of the provisions of former treaties with the Winnebagoes in such manner and to whatever extent he may judge to be necessary and expedient for their welfare and best interests.

4. Beginning in August 1862 the Sioux of the Mississippi attacked the white settlers in the State of Minnesota, killing a number of men, women, and children, and destroying and damaging a large amount of property. This outbreak was known as the Sioux war of 1862, and is sometimes referred to as the "Minnesota" or "New Ulm Massacre." Plaintiffs took no part in this outbreak, but the white residents believed that they did and they threatened retaliation. The situation became so acute that the Indian Agent for the Winnebagoes felt it necessary to strictly confine them to the limits of their reservation. Still, public clamor and demands for vengeance against all Indians in the State, and particularly against the Sioux and the Winnebagoes, increased, and open conflict and bloodshed became imminent.

The white people demanded the removal of all Indians from the State. In response thereto, the House of Representatives by resolution passed on December 1, 1862, directed its committee on Indian Affairs to report "the most speedy and economical mode of removing from the State of Minnesota all the Indians within her borders."

The advice of the Secretary of the Interior was requested. With reference to the Winnebagoes he said:

> The Winnebagoes have a small territory of four and a half townships of land, designed for their permanent homes. It is situated in the county of Blue Earth, surrounded by settlers, with no natural boundary. These Indians are constantly exposed to collision with the whites, who now entertain, it appears, hostile feelings towards all Indians. It is due, however, to these Indians to say that recent investigations have failed to show that any act has been committed by them at all justifying the ill will existing against them, and it is only for their security and advantage that I am induced to advise their emigration. It is with extreme reluctance that they will consent to leave their homes, and the government cannot be justified in requiring them to emigrate unless it can be satisfactorily shown that the Indians will be benefited thereby in everything that may relate to their security, happiness, and future prosperity.
>
> From inquiries made of persons well acquainted with the country of the Upper Missouri river, it is believed that a location may be found for these Indians bordering

> upon the river Missouri and some of its tributaries, with at least two natural boundaries, of the quality as to wood, water, and adaptation to agriculture described in the bill herewith sent for your consideration, where the Winnebagoes may be established with better prospects of sooner being able to sustain themselves, independent of the government, than in their present location.
>
> As the Winnebagoes are without any fault sufficient to justify any substantial complaint, it is but just that if the government requires their removal their new homes shall be donated to them without cost, and that they shall have the benefit of the sale of their present reservations, which it is supposed will realize to them, at least, $150,000; and to that extent it is to be hoped they will be benefited if they are required to remove from the State.

Following this, Congress passed the Act of February 21, 1863 (12 Stat. 658). Under it the President was authorized to assign and set apart for the plaintiffs a tract of unoccupied land beyond the limits of any State of a size not less than their diminished reservation, and also "to take such steps as he may deem proper to effect the peaceful and quiet removal" of the Indians from the State, and to "settle them upon the lands" chosen for them. It was provided that the lands in the Blue Earth reservation should be appraised and sold for a price not less than their appraised value, nor less than $1.25 an acre, and for the use of the proceeds of the sale in making "necessary improvements upon their new reservation." All of the lands, except 1,841.56 acres which had been allotted to certain Winnebagoes who were unwilling to remove therefrom, were sold for the sum of $263,744.62, all of which was disbursed for their benefit. The Indians who were unwilling to remove were allowed to remain on their allotments.

5. In accordance with the provisions of the Act of February 21, 1863, *supra*, 1,945 Winnebagoes were removed under military escort to a reservation selected for them at Usher's Landing, Dakota Territory, consisting of approximately 368,649 acres. Their personal belongings were also removed, as well as such improvements as could be removed; the im-

provements which could not be removed were sold and the proceeds disbursed for their benefit.

6. The Winnebagoes were dissatisfied with their new location from the start, principally because they felt that the small detachment of soldiers attached to the agency was not sufficient to protect them from their enemies, the Sioux, who threatened them with annihilation. They refused to separate and to live upon separate tracts of land and to attempt to cultivate the soil, but lived under the protection of the soldiers in one consolidated community in the shadow of the stockade which had been erected for their protection and the protection of government property. When practically all of the soldiers were withdrawn in August 1863 their fears increased, and more than 600 of them left the reservation during that month to seek safety among the Omahas in Nebraska. Within a year thereafter more than 1,300 had left, most of them proceeding to the Omaha reservation and others rejoining scattered bands of their own people in Minnesota and Wisconsin.

Under these conditions, the apparent unfitness of the Usher's Landing reservation for purposes of agriculture, the impossibility of inducing the Winnebagoes to return thereto, the willingness of the Omahas to dispose of a part of their reservation as a home for the Winnebagoes, and the desire of the Winnebagoes to be settled with or near the Omahas, the Commissioner of Indian Affairs on November 15, 1864, recommended that an arrangement be made with the Omahas whereby a part of their reservation might be secured as a home for the Winnebagoes.

7. By a treaty with the Omaha tribe of Indians (14 Stat. 667) the defendant secured a tract of 128,000 acres, which was fertile, well timbered, and watered. This tract of land the defendant set apart for the occupation and future home of the plaintiffs, in consideration of the cession to the defendant of all their right, title, and interest in their reservation at Usher's Landing (14 Stat. 671). The defendant also agreed to make certain improvements and furnish them with certain farming implements, seeds, etc.

To fulfill the obligations of this treaty the defendant has expended for the benefit of the plaintiffs $213,347.24.

The court decided that the plaintiffs were not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

The facts are fully set out in the findings. They show that the plaintiffs were removed from their reservation in Minnesota to the reservation at Usher's Landing because, in the opinion of the Congress, this was thought to be for their best interest. Congress, acting as the guardian of an Indian Tribe, has the power to take from it one reservation and to give to it another, if it thinks that this is for its best interest, and in the absence of express Congressional authorization this Court has not the power to determine whether or not just compensation was paid for the one taken. We went into this entire question in great detail in an opinion rendered through Judge Littleton in the case of *Sioux Tribe of Indians* v. *The United States*, No. C–531–(7), decided June 1, 1942. In that opinion the whole question was carefully and exhaustively discussed. The decision in that case is determinative of the case at bar. (97 C. Cls. 613; certiorari denied, 318 U. S. 789.)

Congress in the jurisdictional Act in this case has not conferred upon us authority to determine whether or not just compensation has been paid for the lands taken. It confers jurisdiction on us to render judgment "in any and all legal and equitable claims arising under or growing out of the treaty of February 27, 1855, * * * and the Act of February 21, 1863." No legal or equitable liability was incurred by the defendant when, under the authority of this Act of Congress, these Indians were removed from their old reservation and settled upon another.

We might say, in passing, that it appears that this tribe has been treated fairly, if not generously.

On the authority of the *Sioux* case cited above, plaintiff's petition will be dismissed. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

TIMOTHY A. DUGAN v. THE UNITED STATES

[No. 45459 Decided April 5, 1943. Plaintiff's motion for new trial overruled June 7, 1943.]

On the Proofs

Pay and allowances; enlisted man in Navy entitled to retired pay from date of transfer, and not from date of correction of date of expiration of thirty years service, under the Act of June 25, 1938.—An enlisted man in the Navy on the retired list, with 30 years service, is entitled to retired pay and allowances from the date of transfer to the retired list, under the provisions of the Act of June 25, 1938, and not from date of correction of the expiration date of thirty years service.

Same.—Section 202 of the Act of June 25, 1938, is a remedial statute, enacted to permit the remedy of wrongs committed through error, permitting the Secretary of the Navy, upon discovery of "any error or omission in the service, rank, or rating for transfer or retirement" of an enlisted man, to correct such error or omission, and upon such correction "the person so transferred or retired shall be entitled to pay and allowances, in accordance with his rank or rating and length of service as determined by the Secretary of the Navy;" and such right to said retired pay and allowances dates from date of transfer to the retired list, and not from date of correction.

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *Messrs. King & King* were on the brief.

Mr. L. R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Joseph M. Friedman* was on the brief.

The court made special findings of fact as follows:

1. Plaintiff enlisted in the United States Marine Corps and served through four enlistments as follows: From August 2, 1902, to August 4, 1906; November 23, 1906, to November 22, 1910; November 25, 1910, to November 24, 1914, and November 24, 1914, to November 24, 1918.

From February 24, 1919, to February 23, 1923, and from March 8, 1923, to May 19, 1926, all dates inclusive, plaintiff was a member of the Fleet Marine Corps Reserve (inactive).

Plaintiff again enlisted in the United States Marine Corps and served from May 20, 1926, to July 2, 1926.

On July 3, 1926, plaintiff was transferred to Class II (b) of the Fleet Marine Corps Reserve (inactive) and remained in that status until March 16, 1928.

Between February 24, 1903 and September 1, 1908, plaintiff served four years, eleven months, and twenty-one days in the Philippine Islands and in China.

2. On November 1, 1930, plaintiff, having been found not physically qualified for active duty in the event of a national emergency, was transferred to the retired list of enlisted men of the regular Marine Corps.

When he was transferred to the retired list he was furnished with a statement of his service, which showed that exclusive of foreign service, which was then not allowed. to be counted as double time for the purpose of retirement from the Fleet Marine Corps Reserve, he would complete thirty years' Naval service on May 19, 1940, and would be eligible to receive the allowances to which enlisted men of the regular Marine Corps were entitled to receive upon retirement.

3. On May 14, 1935, the Major General Commandant of the United States Marine Corps furnished plaintiff with a statement of his service, in which he was advised that service performed by him in the Philippine Islands and China prior to August 24, 1912 was computed as double time for the purpose of retirement from the Fleet Marine Corps Reserve in accordance with an opinion rendered by the Judge Advocate General of the Navy on August 1, 1930.

Plaintiff was also advised that the counting of his foreign shore service as double time changed the date on which he was eligible to receive additional allowances from May 19, 1940, to May 27, 1935; but he was advised of a decision rendered by the Comptroller General of the United States on November 3, 1933, in which it was held that when a date had been definitely set by the Navy Department at the time of transfer, it could not later be changed and, in view of that decision, informed plaintiff that he would not be eligible to receive additional allowances until May 19, 1940.

4. On July 1, 1935, the Major General Commandant of the United States Marine Corps notified plaintiff that he was advanced to his World War rank of sergeant on the retired list as authorized by an Act of Congress approved May 7, 1932, 47 Stat. 150, to be effective immediately after the date he completed thirty years' service on May 27, 1935. He was also advised that no increase in active or retired pay or allowances would result from said advance in rank.

5. On June 8, 1939, the Major General Commandant advised plaintiff that Section 202 of the Naval Reserve Act of 1938, approved June 25, 1938, 52 Stat. 1175, authorized the correction of retirement dates of men transferred to the retired list from the Fleet Marine Corps Reserve, which correction had been prohibited by prior laws and that the date on which he completed thirty years' service was, accordingly, corrected to May 27, 1935.

Plaintiff was also advised that application for the retired allowances for the period from May 27, 1935, might be submitted to the General Accounting Office. In this connection plaintiff's attention was directed to the following quotation from an opinion rendered by the Judge Advocate General and approved by the Secretary of the Navy on January 17, 1939, as follows:

> The decisions of the Comptroller General in the cases of Young and Tanner as applied to the question of whether the retirement date may now be set back to give the man the benefit of service rendered by him which was not counted at the time of his transfer to the retired list prior to July 1, 1938, hold that although the errors in computation of service for transfer may be corrected by the Secretary of the Navy, the men will not be entitled to any back pay and allowances. Where the claimant is entitled to an increase in pay and allowances after July 1, 1938, as the result of the correction of an error in computation of service under the provisions of this Act such increase does not become effective until the date when such correction is made.

6. Plaintiff filed a claim with the General Accounting Office for retired allowances for the period from May 27, 1935, to June 8, 1939. On September 27, 1939, the Comptroller General denied the claim and informed plaintiff as follows:

> In view of the fact that the Secretary of the Navy did not determine that you had completed 30 years' service until June 8, 1939, payment of your claim prior to that date is not authorized.

7. On February 7, 1941, pursuant to plaintiff's request, the Major General Commandant of the United States Marine Corps notified plaintiff that on March 16, 1928, he completed thirty years' service in the United States Marine Corps and the Fleet Marine Corps Reserve, including foreign shore service counted as double time.

Plaintiff was also advised as follows:

> There would be no object, however, in changing the date set by the Secretary of the Navy as being 27 May 1935 since the General Accounting Office, in its letter to you dated 27 September 1939, stated that no payment would be allowed for the period prior to 8 June 1939, the date of the letter from this office setting the date at 27 May 1935.

8. On April 29, 1941, pursuant to plaintiff's request, the Major General Commandant informed plaintiff as follows:

> In accordance with the request contained in reference (b) so much of reference (a) as stated you completed thirty years' service in the Marine Corps, Marine Corps Reserve, and on the retired list on 27 May 1935 is hereby modified to state that you completed thirty years in the Marine Corps and Marine Corps Reserve, including foreign shore service which may be computed as double time, on 16 March 1928.

The correction of plaintiff's record showing that he completed thirty years' service on March 16, 1928, was approved by the Secretary of the Navy on April 29, 1941.

9. Plaintiff is entitled to the retired pay and allowances of a retired enlisted man of the United States Marine Corps of his grade and length of service from the date he was transferred to the retired list, to wit, November 1, 1930, to June 8, 1939.

The court decided that the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

This is a suit by a retired enlisted man of the United States Marine Corps to recover the retired allowances for the period

from March 16, 1928, when he completed thirty years' service, until June 8, 1939, at which time the Major General Commandant of the Marine Corps corrected his former finding as to the expiration of plaintiff's thirty years' service, and from which time the plaintiff has received the retired pay and allowances to which he is entitled.

Plaintiff was retired on November 1, 1930, for physical disability. At that time the Marine Corps determined that he would complete thirty years' Naval service on May 19, 1940.[1] Thereafter, on May 14, 1935 the Major General Commandant of the Marine Corps discovered that in his former computation of the expiration of plaintiff's thirty years' service he had failed to allow him double time for the period of his service in the Philippine Islands and China, and that, accordingly, the date of the expiration of his thirty years' service was May 27, 1935, instead of May 19, 1940, as he had formerly computed it. However, he advised plaintiff that the Comptroller General had ruled that once the date of the expiration of the thirty years' service had been determined and plaintiff had been retired, this date could not thereafter be changed. This ruling was made because of the provisions of section 2 of the Act of May 23, 1930 (46 Stat. 375), which provided in part:

> All transfers of enlisted men * * * heretofore or hereafter made * * * shall be conclusive for all purposes, and all men so transferred shall from date of transfer be entitled to pay and allowances in accordance with their ranks or rating and length of service as determined by the Navy Department at time of transfer.

At the time of plaintiff's retirement it had been determined by the Navy Department that his thirty years' service would expire on May 19, 1940 and, therefore, notwithstanding the

[1] Under the Act of March 2, 1907 (34 Stat. 1217, 1218) it was provided:

> That when an enlisted man shall have served thirty years either in the Army, Navy, or Marine Corps, or in all, he shall, upon making application to the President, be placed upon the retired list, with seventy-five per centum of the pay and allowances he may then be in receipt of * * * *Provided*, That in computing the necessary thirty years' time all service in the Army, Navy, and Marine Corps shall be credited.

Unlike the Act of August 29, 1916 (39 Stat. 556), involved in the case of *Carl H. Hilton* v. *United States*, No. 45350, this day decided by this court, the act of February 28, 1925 (43 Stat. 1080, 1087) established the Naval Reserve as a component part of the Navy.

later discovery of the error, it was thought this Act prevented its correction.

Later, Congress passed the Act of June 25, 1938 (52 Stat. 1175), section 202 of which contained a proviso substantially reenacting section 2 of the Act of 1930, *supra*, but with the further proviso:

> * * * That the Secretary of the Navy, upon discovery of any error or omission in the service, rank, or rating for transfer or retirement, is authorized to correct the same and upon such correction the person so transferred or retired shall be entitled to pay and allowances, in accordance with his rank or rating and length of service as determined by the Secretary of the Navy.

Under the permission thus granted to correct the error committed, the Secretary of the Navy on June 8, 1939 corrected the date of the expiration of plaintiff's thirty years' service to May 27, 1935, and plaintiff has been paid retired pay and allowances from the date of the correction. He was not paid from the date of the expiration of his thirty years' service because of decisions of the Comptroller General holding that after correction of the retirement date the retired enlisted man was entitled to pay and allowances only from the date of the correction; it was held he was not entitled to back pay and allowances.

The correctness of this ruling is the question presented.

It should be stated further that the Major General Commandant of the Marine Corps discovered still later, on February 7, 1941, that plaintiff's thirty years' service had expired even before May 27, 1935, to wit, on March 16, 1928. Plaintiff's suit, therefore, is for back pay and allowances from March 16, 1928 to June 8, 1939.

Plaintiff's rights depend upon the proper construction of the two provisos of section 202 of the Act of June 25, 1938, *supra*. The first proviso reads:

> * * * *Provided*, That all transfers * * * heretofore or hereafter made by the Secretary of the Navy, shall be conclusive for all purposes, and all members so transferred shall, *from the date of transfer*, be entitled to pay and allowances, in accordance with their ranks or ratings and length of service as determined by the Secretary of the Navy. [Italics ours.]

Plaintiff was transferred to the retired list on November 1, 1930, and if on that date he had completed thirty years' service, he would be entitled to retired pay and allowances from that date. The Secretary of the Navy on April 29, 1941 found that he had completed thirty years' service on March 16, 1928.

Except for the error made by the Major General Commandant at the time of plaintiff's retirement, he would have received retired pay and allowances from November 1, 1930. He, however, was refused it on account of the provisions of the Act of May 23, 1930, *supra*, making the Secretary's finding at the time conclusive. Congress, however, in passing the Act of June 25, 1938, *supra*, sought to remedy such situations and added the second proviso above referred to permitting the Secretary of the Navy to correct such errors.

This, of course, was a remedial statute passed to permit the remedy of wrongs committed through error. If this language is to be construed as the defendant contends, to operate only from the date of the correction, the wrong will be corrected only in part. We are of opinion that Congress intended to fully correct the wrong committed and, therefore, to permit payment of all pay and allowances, not from the date of the correction, but "from the date of transfer." Under the first proviso in section 202, *supra*, retired enlisted men were expressly entitled to retired pay "from the date of transfer" to the retired list. This plaintiff is entitled to retired pay "from the date of transfer," having at that time completed thirty years' service, and he would have been receiving it except for the error committed by the Secretary of the Navy. The Secretary of the Navy has corrected the error by later finding that the plaintiff had completed his thirty years' service before the date of his transfer to the retired list.

There is nothing in the Act which fixes the beginning of the right to retired pay as the date the error is corrected. The basic provision of the Act is that it shall begin "from the date of transfer." In the absence of such an express limitation, we must conclude that Congress intended the right to begin from the date of transfer, both in the case of

men whose service had been properly computed at the time and those whose service first had been improperly computed and later corrected.

For what reason could Congress have wanted to make a distinction between the two classes? Both of them would have been receiving retired pay beginning "from the date of transfer," except for the error committed by the defendant's officers. Surely Congress did not intend to take any advantage of an error committed. Its plain purpose, it seems to us, was to completely remedy any wrong done by the commission of the error.

If there can be any doubt about the correctness of this conclusion, we think that doubt is removed by a comparison between the bill as originally introduced and as finally passed. As originally introduced, the second proviso read that the Secretary of the Navy might correct the error "and upon such correction, the person so transferred or retired shall be entitled to pay and allowances, in accordance with his rank or rating and length of service as determined by the Secretary of the Navy, *as of the date of such determination*." Had the italicized language remained in the bill there would have been room for the construction that the pay and allowances were to start on the date of the determination, but that this language was stricken by Congress when they passed the Act is a clear indication that it did not intend it to start from this date, but rather from the date that other enlisted men were entitled to it, that is, from the date of transfer to the retired list.

At the time of his retirement plantiff did not make application for retired pay and allowances on account of the expiration of thirty years' service, because he was told it would not expire until 1940. Later, when advised by the Major General Commandant on May 14, 1935, that his thirty years' service would expire on May 27, 1935, he was at the same time told that he was ineligible to receive additional allowances until May 19, 1940, on account of a decision by the Comptroller General under the Act of May 23, 1930, and later, when on June 8, 1939 the expiration of his thirty years' service was formally corrected, he was again advised that such correction was prospective only. Notwithstanding this,

however, plaintiff did file a claim with the General Accounting Office as soon as the thirty years had expired as then computed, to wit, on May 27, 1935, but this claim was rejected.

We are of the opinion that the plaintiff is entitled to recover back pay and allowances from the date he was transferred to the retired list, to wit, November 1, 1930, until June 8, 1939, after which date he has been paid the pay and allowances to which he is entitled.

Plaintiff is not entitled to recover from March 16, 1928, because he was not transferred to the retired list until November 1, 1930, and his retired pay begins with the date of his transfer.

Judgment will be suspended until the incoming of a report from the General Accounting Office of the amount to which the plaintiff is entitled, computed in accordance with the findings of fact and this opinion. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

In the above case, upon a report from the General Accounting Office showing the amount due plaintiff in accordance with the Court's decision to be $1,625.93, judgment was entered November 1, 1943, for plaintiff in the sum of $1,625.93.

ARTHUR W. LANGEVIN v. THE UNITED STATES

[No. 43903. Decided May 3, 1943. Plaintiff's and defendant's motions for new trial overruled November 1, 1943]

On the Proofs

Government contract; in the assessment of liquidated damages for delay findings of contracting officer final as to facts and extent of delay but not in suit by plaintiff to recover damages for delay.—Under the provisions of Article 9 of the Standard Government Construction Contract, on the question of the assessment of liquidated damages the findings of the contracting officer as to the facts and the extent of delay are final and conclusive, subject

to appeal to the head of the department, but on the question whether or not the defendant had caused a delay for which it might be held liable for damages, the contracting officer's findings of fact are not final and conclusive.

Same; validity of agreement that findings of contracting officer shall be final in suit against defendant for delay.—Where Congress has consented that the Government may be sued only in the Court of Claims, and in certain cases in the district courts, on claims arising out of Government contracts, an agreement by parties to a Government construction contract that some one other than the Court of Claims or a district court may finally determine the facts upon which the liability of the Government rests would be in violation of the Act of Congress vesting jurisdiction in the Court of Claims and the district courts and, therefore, such agreement would be void, if made.

Same.—The Court of Claims has consistently held that neither Article 9 nor Article 15 of the Standard Government Construction Contract gives the contracting officer the power to determine finally a contractor's claim for damages for delay. See *Phoenix Bridge Co.* v. *United States*, 85 C. Cls. 603; *Plato* v. *United States*, 86 C. Cls. 665; *United States* v. *Rice and Burton, Receivers*, 317 U. S. 61.

Same; damages for delay caused by changes by defendant.—Where defendant had the right to make changes in the contract, plaintiff is not entitled to recover damages for delay caused by changes made by defendant. *United States* v. *Rice and Burton, Receivers*, 317 U. S. 61.

Same; failure to request extension of time; waiver.—Where contractor failed to request an extension of 27 days on account of delays in supplying details and drawings at the time he requested an extension of 24 days on another account, which extension of 24 days was granted, contractor thereby waived his claim to the 27 days' delay.

Same; notification of fact of delay, necessity for.—Failure of contractor to notify the contracting officer of delays at the time of their occurrence, as required by the contract, precludes recovery under the Supreme Court's decision in *Plumley* v. *United States*, 226 U. S. 545.

Same.—A requirement that notice of delay be given as a condition precedent to the maintenance of a suit against the United States in no way impinges upon the jurisdiction conferred on the Court of Claims by Congress.

Same; notice.—Where the cause of delay is within the knowledge of the contracting officer, notice is not necessary.

Same; delay in final inspection; notification that delay was causing damage, necessity for.—Where, with the contractor's consent, building was occupied by the Government before final inspection, and where contractor did not notify the contracting officer that

he was being damaged by such delay in making final inspection; plaintiff is not entitled to recover.

Same; actual damages, proof of.—Actual damages must be definitely proven. *Eastern Contracting Company* v. *United States*, 97 C. Cls. 341.

Same; liquidated damages deducted, recovery for.—Where contractor was delayed by defendant's representative in determining the depth of footings required, for which delay no extension was granted; and where contractor was unable to give his personal supervision by reasons of circumstances for which defendant was responsible, resulting in delay of completion; assessment of liquidated damages was unreasonable and arbitrary, and plaintiff is entitled to recover.

Same; contracting officer's change of interpretation of contract after completion of work.—Where the contract drawings specified a tin roof, which contractor installed, under the supervision of the construction engineer, after a sample of the tin had been submitted to the supervising architect and approved by him; and where later upon a report of a traveling inspector the supervising architect reversed his previous interpretation of the plans and specifications and required contractor to remove the tin roof and replace it with copper, which the contractor did under protest; plaintiff is entitled to recover.

Same.—The interpretation of the plans and specifications by the contracting officer is final and conclusive under the provisions of the Standard Government Construction Contract, but there is nothing in the contract or specifications that gives the contracting officer the right to reverse his ruling after the work has been done in accordance with the original instructions of the contracting officer.

The Reporter's statement of the case:

Mr. Bernard J. Gallagher for the plaintiff. *Mr. M. Walton Hendry* was on the briefs.

Mr. Percy M. Cox, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Newell A. Clapp* was on the brief.

The court made special findings of fact as follows:

1. The plaintiff, Arthur W. Langevin, entered into a contract with the defendant on January 10, 1933, whereby for a consideration of $77,000 he agreed to furnish all labor and materials and perform all work required for the construction of a Post Office at Weston, West Virginia. The work was to be completed within 360 days after receipt of notice to pro-

ceed. This notice was given on January 17, 1933, which fixed January 12, 1934 as the date of completion.

2. The building was substantially completed and occupied by the Government on October 1, 1934, although the correction of defects and other work of a minor nature were not finished until November 26, 1934. On account of the delays hereinafter referred to, defendant granted plaintiff extensions of time aggregating 238 days, or until September 7, 1934, to complete the contract. Plaintiff was held responsible for 24 days' delay occurring between September 7, 1934 and October 1, 1934, and $720 was deducted from the contract price as liquidated damages.

3. Stephen W. Ford, an architect of Clarksburg, West Virginia, hereinafter referred to as the "architect," was authorized by the contract to prepare all drawings and specifications, pass on all shop drawings, approve or reject architectural samples, and criticize or approve all ornamental work, colors, and finishes. By June 22, 1933 he had severed all connection with the work and his duties were assumed by defendant's supervising architect at Washington, D. C.

4. Article 9 of the contract provides in part as follows:

> * * * the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: *Provided further*, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

5. While plaintiff was excavating for footings on March 6, 1933, it was found that the footings specified in the con-

tract were not sufficient for the ground conditions. The construction engineer, who supervised the work for defendant, ordered plaintiff to cease work pending the receipt of instructions from the contracting officer. March 24, 1933 plaintiff was instructed to lower the footings down to shale and, on completing the extra work, to submit his proposal with an itemization of cost and a statement of the exact number of days he was delayed. On the same day plaintiff made a written proposal to perform the additional work at cost, plus 10 percent for overhead and 10 percent for profit. Exclusive of the time lost on account of rain, 15 days were required for the extra work, which was finished April 25, 1933. April 28, 1933 plaintiff mailed to the contracting officer a statement of the cost of the work, including the 10 percent for overhead and 10 percent for profit. This amount was allowed and paid in full. At the same time plaintiff attached a letter to the statement requesting his cost of superintendence and overhead during 15 days of the period the work was discontinued to await instructions from the Government.

The contract was extended for a period of 15 days, representing the time required for lowering the footings. No extension of time was allowed for the interval during which plaintiff awaited notice to proceed, nor was any payment made to cover plaintiff's claim for superintendence and overhead during that period.

Eighteen days was an unreasonable length of time for defendant to take to determine to what depth the footings should be lowered. This should have been determined in not more than three days.

6. Beginning on February 14, 1933, plaintiff submitted to the architect various samples and drawings. The architect took no action thereon, but on February 20, 1933, he wrote plaintiff that he had not received necessary instructions from the Treasury Department and suggested that plaintiff send all drawings and samples to that department in Washington. Thereupon plaintiff forwarded the samples and drawings to defendant's supervising architect, submitting the reinforcing steel drawings on February 27, 1933 and the structural steel

drawings on March 8, 1933. No approvals were given, but the supervising architect advised plaintiff by letters of March 17 and 22, 1933 that the samples and drawings were being returned to the architect at Clarksburg for his approval.

Plaintiff was ready to use the reinforcing steel on March 24, 1933, but, because of defendant's delay in approving the necessary drawings, the steel was not received until April 6, 1933. No request for extension of time was made on account of this delay which was concurrent with that occasioned by lowering the footings. The structural steel drawings submitted on March 8, 1933 were not approved until April 28, 1933. As a result work on the building was at a standstill from May 2 to May 20, 1933, when the structural steel was delivered. During the same time the brick and granite work was held up because of the architect's delayed action on the granite drawings. For the time lost on the structural steel work plaintiff requested an extension of time of 19 days, which was approved by the contracting officer.

7. Between May 20 and August 15, 1933 plaintiff was delayed while waiting for defendant to supply the details and drawings for millwork and to approve the drawings and samples for marble. The architect, who was required by the contract to furnish the millwork drawings, failed to reply to plaintiff's letters of March 24 and May 17, 1933, in which these drawings were requested. The marble samples and drawings which plaintiff mailed to the architect for approval were returned in the original package unopened. On July 21, 1933, plaintiff wrote the supervising architect in part as follows:

> You certainly must be convinced by now that Mr. Stephen W. Ford has severed all relations with this work and should, therefore, inform me immediately what I am to do with the samples, drawings and questions I have for immediate action and decision. These were submitted to the architect months ago in accordance with the specifications and terms of my contract.
>
> I wish to again go on record for delay, to the extent of which I do not know at this time that will be occasioned by the samples and drawings not having been approved to date, * * *. I will expect to be paid

for the additional cost of overhead, supervision and labor for installing same, at a later date and not in the progress of the regular work.

July 27, 1933 the supervising architect wired plaintiff to submit all unapproved samples, drawings, and models to defendant's Washington office. Plaintiff received details of the millwork drawings for the basement window frames June 22, 1933, but did not receive the drawings for the circle head window frames until August 8, 1933. The record is not sufficient to show the extent and results of the time lost on construction through defendant's inaction on these samples and drawings. However, progress was slow because, instead of being able to carry on several portions of the work contemporaneously, plaintiff had to perform one job at a time. The front of the building had to be left open in the absence of the circle head window frames and the brick could not be bound to these frames. On several occasions after this delay had occurred the contracting officer requested plaintiff to submit a statement of the date, cause, and extent of each delay, with an accompanying recommendation of the construction engineer. For the time lost between May 20 and August 15, 1933 plaintiff requested the construction engineer to recommend that the contract be extended for a period of 27 days. The construction engineer refused to recommend any extension of time for delay during this period, and plaintiff did not mention such delay in his letters of April 13, 1934 and October 10, 1934 to the contracting officer, wherein he enumerated the cause and extent of all other delays. There was no finding of fact made and no extension of time granted with respect to this delay.

8. The contract required defendant to furnish plaintiff the terra cotta models. As early as February 17, 1933 plaintiff requested that these models be shipped to the manufacturer. Failing to receive any reply, plaintiff wrote both the architect and the supervising architect on May 4, May 17, June 14, and June 22, 1933 in an effort to expedite action on the models.

The defendant prolonged the manufacture, inspection, and shipment of the models for an unreasonable and unnecessary length of time so that the terra cotta was not delivered until

February 10, 1934. During all this time plaintiff repeatedly wrote defendant complaining of the delay and additional expense incurred by him for labor, extra materials, and overhead, and warned that further delays were anticipated through postponement of exterior work until the winter months. Very little progress was made from August 15, 1933 to February 10, 1934. By means of an inside scaffold plaintiff carried up the brick backing from the top of the first floor windows to the bottom of the second floor, leaving out the face brick and terra cotta. This was not the proper or customary method of construction, but was adopted at defendant's request and it minimized the delay somewhat.

Plaintiff requested an extension of time of 180 days for the delay caused by defendant's tardiness in providing the terra cotta models, and the contracting officer extended the contract for the full period requested.

9. As a result of the delays caused by defendant, which have been discussed in the previous findings, plaintiff's exterior masonry work was postponed until the winter of 1934, one of the coldest winters recorded in a 20-year period. Between February 10 and April 1, 1934 plaintiff lost 24 working days on account of extremely cold weather and the contracting officer extended the contract for that period of time.

10. From April 1, 1934 to September 27, 1934, plaintiff experienced a great deal of difficulty in inducing his subcontractors to proceed with their subcontracts because of a substantial increase in the cost of labor and materials in the summer and fall of 1934, due to the adoption of the Codes of Fair Competition and to work projects totaling approximately $500,000, which were instituted by the Civil Works Administration in the vicinity of the post office. Under these conditions the subcontractors, who had expected to perform their work within the original period of the prime contract, were reluctant to work in the summer and fall of 1934. In order to compel their performance, plaintiff had to threaten suit against them, and plaintiff also had to expend money in addition to the amounts provided for in the subcontracts in order to hold these men on the job.

The delay caused by this situation aggregated 37 days. Plaintiff did not notify the contracting officer of this delay or of the cause thereof until October 10, 1934. The contracting officer made no finding regarding this particular delay and no extension of time was granted therefor.

11. The specifications required the contractor to give the supervising architect seven to ten days advance written notice of the date when the building would be ready for final inspection. Plaintiff gave such notice on September 17, 1934, stating that the building would be ready for final inspection on September 27, 1934. The building was occupied by the Government, with plaintiff's consent, on October 1, 1934, at which time there was a balance of 1.44 percent of the contract to be completed. Inspections were made by defendant's general inspector on October 16, 1934, and by the mechanical inspector October 24, 1934. Both inspectors made lists of minor omissions and defects, which were not corrected until November 26, 1934.

Had both inspections been made on September 27, 1934, plaintiff could have completed all of the work 27 days in advance of the actual completion date. Plaintiff did not give the contracting officer written notice of this delay, or make any claim for extension of time therefor. The contracting officer made no finding with respect to this delay, nor was the contract period extended because of it.

12. February 12, 1935 the contracting officer made his written report and recommendations to the Secretary of the Treasury. This report included findings on the cause and extent of various delays, and a finding that liquidated damages should be assessed against plaintiff.

The Secretary of the Treasury approved the findings of the contracting officer on February 12, 1935, and the final voucher was issued shortly thereafter. It was accepted by plaintiff with the following reservation: "In signing this voucher I hereby reserve all my rights regarding all claims arising under this contract."

13. Plaintiff was delayed by the Government a total of 238 days, for which extensions of time were granted. Fifteen days' delay was due to the additional time required to lower the footings. It does not include the 15 days' delay

in deciding to what depth the footings should be lowered. As a result of the delays totaling 238 days plaintiff sustained damage totaling $13,058.09, made up of the following items: (1) cost of superintendence and job overhead $7,128.10, at $29.95 a day; (2) equipment rentals $2,500; (3) increased price of materials $644.64; (4) loss of discounts for prompt payment of bills $302.30; (5) extra cost of doing certain work $1,907.05; (6) additional travel expense required $576.00.

In addition, plaintiff claims damages of $647.48, an alleged loss due to inefficiency of labor; $1,231.71 an alleged loss on the surrender of an insurance policy; $5,761.80, an alleged loss on subcontracts; and $6.50, an alleged cost of extra photographs.

14. Article 8 of the contract required the contractor to give his personal supervision to the work or have on the work at all times a competent foreman or superintendent satisfactory to the contracting officer, with authority to act for the contractor. For three or four months prior to October 1, 1934 plaintiff, who acted as his own superintendent, was frequently absent from the site of the work and did not leave a competent superintendent in charge. Plaintiff's absence was due to financial difficulties occasioned by previous delays on the part of the Government. While he was away from the job plaintiff spent his time in attempting to establish new lines of credit, trying to locate and contract with subcontractors, traveling to Washington to confer with defendant's officers, and in doing office work.

Had plaintiff given the work adequate supervision during this time, the contract could have been completed at least 24 days before the date of substantial completion. The contracting officer found that plaintiff was responsible for this delay, and liquidated damages at the contract rate in the sum of $720 were deducted from the contract price. One of plaintiff's claims is for the remission of the amount deducted as liquidated damages.

15. Contract drawing F-4 plainly showed that the roof over the loading platform of the Post Office should be constructed of tin. In the middle of the drawings showing the roof of this platform there was written in large capital letters the words "TIN ROOF." The specifications said

nothing about the kind of roof for this loading platform, but they did provide for the kind of roofing on other parts of the building.

Prior to installing the roof plaintiff sent a sample of the tin he proposed to use for this purpose to the supervising architect for approval. It was returned approved. Thereafter, sometime before July 31, 1934, plaintiff had his subcontractor install the tin roof. This was done under the supervision of the construction engineer. At the end of the month plaintiff was paid 90 percent of the cost of the tin roof. About a month later a traveling inspector from the supervising architect's office visited the job and told plaintiff that the tin would have to be removed and copper substituted therefor, since paragraph 422 of the specifications provided that "All exterior sheet metal work shall be of copper." Plaintiff protested. Whereupon the construction engineer wrote the supervising architect for instructions. The supervising architect held that a copper roof was required and plaintiff was required to remove the tin roof and replace it with a copper one. This plaintiff did under protest, and at a cost of $319.44.

This work was done under a subcontract. Plaintiff demanded of his subcontractor that the tin be removed and copper substituted. The subcontractor complied with the demand, but under protest and with notice that he would expect plaintiff to pay for the cost of replacement. On October 19, 1934 the subcontractor presented plaintiff with a bill for $319.44 for the cost of replacing the tin roof. This bill has not been paid, but it is still asserted against the plaintiff.

In the contracting and construction trade the words "exterior sheet metal" refer to gutters, flashings, skylights, and louvers, but do not refer to roofs.

The contract and specifications provide that in case of conflict between the drawings and specifications, the latter shall govern.

Article 15 of the contract provides:

> *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by

the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such question of fact. In the meantime the contractor shall diligently proceed with the work as directed.

Paragraph 26 of the specifications provides that the decision of the contracting officer or his authorized representative as to the proper interpretation of the drawings and specifications shall be final. The supervising architect was the authorized representative of the contracting officer.

16. Plaintiff has abandoned the claim made in his petition for furnishing vault doors and a rolling curtain for the parcel post window.

The court decided that the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff seeks to recover (1) for damages for delays caused by defendant; (2) for liquidated damages deducted; and (3) for the cost of putting on a copper roof.

Plaintiff had a contract for the construction of a Post Office at Weston, West Virginia. It was to be constructed under the supervision of Stephen W. Ford, an architect of Clarksburg, West Virginia, who was authorized to prepare all drawings and specifications, to pass on all shop drawings, to approve or reject architectural samples and all ornamental work, colors, and finishes. Mr. Ford severed his connection with the work on June 22, 1933, and thereafter his duties were assumed by the supervising architect in Washington.

The contracting officer granted extensions of time totaling 238 days for delays caused by the defendant. The plaintiff claims damages for these delays, and also for others for which no extensions of time were granted.

The delays for which extensions of time were granted were occasioned by the following:

(1) 15 days' additional time required for lowering the footings to a depth greater than that originally specified;

(2) 19 days' delay for time lost due to the failure of the architect to promptly approve the structural steel drawings;

(3) 180 days' delay in providing terra cotta models;

(4) 24 days' delay on account of extremely cold weather during which plaintiff had to work caused by defendant's previous delays.

In addition to these delays, plaintiff claims damages for the following delays for which no extensions of time were granted:

(5) 18 days during which the work was suspended while awaiting instructions for lowering the footings;

(6) 27 days' delay in supplying details and drawings for millwork and in approving the drawings and samples for marble;

(7) 37 days' delay due to the reluctance of subcontractors to fulfill their contracts after the expiration of the original period of the prime contract;

(8) 27 days' delay due to defendant's failure to promptly make final inspection of the building.

DELAYS FOR WHICH EXTENSIONS OF TIME WERE GRANTED

(1) *15 days' additional time required for lowering the footings to a depth greater than that originally specified*

Plaintiff is not entitled to recover damages for the period of this delay. The defendant had the right to make changes in the contract and, therefore, in doing so it did not breach the contract and no damages can be recovered for the extra time required. *United States* v. *Rice and Burton, Receivers.* 317 U. S. 61. See (5) below.

(2) *19 days' delay for time lost due to the failure of the architect to promptly approve the structural steel drawings*

Plaintiff received notice to proceed on January 17, 1933. The work was to be completed in 360 days, or by January 12, 1934. On February 14, 1933 plaintiff submitted to Mr. Ford, the architect, various samples and drawings. Six days later Mr. Ford wrote plaintiff that he had not received the instructions from the Treasury Department necessary for him to approve these samples and drawings, and suggested to plaintiff that he send all drawings and samples direct to Washington, although the contract named Mr. Ford as the

person to approve or reject them. Accordingly, plaintiff submitted to the supervising architect in the Treasury Department the reinforcing steel drawings on February 27, 1933, and the structural steel drawings on March 8, 1933. On March 17 and 22 the supervising architect wrote plaintiff that the samples and drawings were being returned to Mr. Ford for his approval. These were not approved until April 28, 1933, and as a result work on the building was at a standstill from May 2 to May 20, both inclusive, a total of 19 days. This was a delay solely occasioned by the defendant's representatives and, therefore, the plaintiff is entitled to recover the damages resulting therefrom.

(3) *180 days' delay in providing terra cotta models*

The contract required defendant to furnish plaintiff with terra cotta models. Plaintiff requested it to do so on February 17, 1933, but received no reply to his request. He repeated this request in letters directed both to Mr. Ford and the supervising architect on May 4, May 17, June 14, and June 22. As a result of defendant's long continued failure to furnish the models the terra cotta was not delivered on the job until February 10, 1934, although plaintiff repeatedly complained of the delay and notified defendant of the additional expense the delay was causing him.

The defendant recognized its default and granted an extension of 180 days on account thereof. Plaintiff is entitled to recover for the damages caused by this delay.

(4) *24 days' delay on account of extremely cold weather during which plaintiff had to work caused by defendant's previous delays*

The building was due to be finished on January 12, 1934. On account of the foregoing delays by the defendant the work was extended throughout the winter of 1933–1934. It was one of the coldest winters recorded in the preceding twenty years, and on account thereof plaintiff's work was delayed. The defendant recognized this and granted him 24 days' additional time on account thereof. Plaintiff is entitled to recover damages suffered on account of this 24 days' delay.

DELAYS FOR WHICH EXTENSIONS OF TIME WERE NOT GRANTED

(5) *18 days during which the work was suspended while awaiting instructions for lowering the footings*

While plaintiff was excavating for footings on March 6, 1933, it was found that the depths originally specified were not sufficient to reach solid bearing. The construction engineer ordered suspension of the work until defendant could determine what it wanted to do. It did not make this determination until March 24, 1933. Plaintiff asked for the cost of superintendence and overhead for 15 days of the total of 18 days while it was awaiting instructions. This was disallowed by the contracting officer.

It is said that this action of the contracting officer is made conclusive by article 9 of the contract. We do not think so. That article relates alone to the assessment of liquidated damages for delay in completing the contract; it does not relate to the defendant's liability for damages resulting from a delay caused by it. On the question of the assessment of liquidated damages the findings of fact of the contracting officer, or the head of the department in case of appeal, on the cause and extent of delay were made final and conclusive; but it is not provided that they are final and conclusive on the question of the defendant's liability for damages.

The contract provides for the assessment of liquidated damages for each day of delay beyond the termination of the contract period, but it provides that liquidated damages shall not be assessed—

> * * * because of any delays in the completion of the work due to unforseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather, or delays of subcontractors due to such causes: *Provided further*, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only

to appeal, within 30 days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

The whole subject in the minds of the parties was the assessment of liquidated damages for delay; they did not have in mind suits against the Government for damages for delays it had caused. On the question of the assessment of liquidated damages the findings of the contracting officer as to the facts and the extent of delay were made final and conclusive, subject to appeal to the head of the department; but on the question of whether or not the defendant had caused a delay for which it should be mulcted in damages, they have not agreed that his findings of fact should be final and conclusive.

There is a sound reason why the parties should have been willing to agree that his findings of fact should be conclusive in one instance and not in the other. In the first it was necessary for the contracting officer to determine only that the contractor should be excused for the delay; in the latter it was necessary for him to determine whether or not the defendant had breached its contract by doing something alleged to have delayed plaintiff. The defendant well might have been willing to submit to the final judgment of the contracting officer and head of the department the assessment of liquidated damages in its favor, but would not have been willing to submit to the final judgment of either of them the question of whether or not it should respond in damages.

Congress has conferred exclusive jurisdiction on this court, and in certain cases on the district courts, to decide claims against the Government. It has consented to be sued only in these forums. Can, then, some agent of the Government other than Congress validly contract that someone other than this court or a district court may finally determine the facts upon which liability of the defendant rests? Ordinarily, when the facts are once found, the case has been nine-tenths decided. Since Congress has vested in this court and in the district courts exclusive jurisdiction of cases against the Government, it is not to be presumed that the parties intended that some other tribunal should make findings of fact

that would be binding on us. If they did, their agreement would be in violation of the Act of Congress vesting jurisdiction in this court and the district courts, and therefore void.

We have consistently held that neither article 9 nor article 15 of the Standard Government Contract gives the contracting officer the power to determine a contractor's claim for damages for delay. See *Phoenix Bridge Co.* v. *United States*, 85 C. Cls. 603, 629, and *Plato* v. *United States*, 86 C. Cls. 665, 677. See also *United States* v. *Rice and Burton, Receivers*, 317 U. S. 61, 67.

In a suit against the United States for damages for delay, we do not think the contracting officer's findings of fact on the cause or extent of delay are conclusive.

We are of the opinion that 18 days was an unreasonable time for the Government to take to determine to what depth the footings should be lowered. With reasonable diligence this determination could have been made within not more than three days. Plaintiff's request for his cost of superintendence and overhead for 15 days' delay was entirely reasonable. He is entitled to recover for this delay.

(6) *27 days' delay in supplying details and drawings for millwork and in approving the drawings and samples for marble*

The extension of 19 days, discussed in (2) above, was for delay from May 2 to May 20, 1933. Plaintiff also claims 27 days' delay from May 20 to August 15, 1933 due to the Government's delay in supplying details and drawings for the millwork and in approving the drawings and samples for granite or marble. There is no doubt but that plaintiff was delayed for some time on this account, but the commissioner has found that the proof does not satisfactorily show the extent of the delay. The plaintiff's proof is unsatisfactory, but he does say that he could have completed the work done between these two dates 27 days earlier had it not been for these delays.

But whether or not this proof would be sufficient for us to determine that he had in fact been delayed this length of time, we do not think he is entitled to recover damages for

any delay during this period because we think he has waived any claim he might have had therefor. The contracting officer several different times requested plaintiff to submit a statement of the dates and causes and extent of each delay, with an accompanying recommendation of the construction engineer. Plaintiff asked the construction engineer to recommend an extension of time of 27 days for the delay during these dates, but he refused to do so, and when plaintiff wrote the contracting officer on April 13, 1934 setting out his several claims for extensions of time on account of delays, he did not mention this delay of 27 days. At the time he wrote this letter he had already been granted the 15 days, the 19 days, and the 180 days' extensions of time discussed above, but he requested a further extension of 24 days on account of having to do his outside masonry work during cold weather. The 24 days were allowed him. By failing to request an extension on account of the 27 days' delay from May 20 to August 15, 1933 and by requesting an extension on another account at the same time, which was granted, we think that he has waived his claim to the 27 days' delay. It may be that had he requested both the 27 days and the 24 days, the 24 days would not have been granted unless he agreed to abandon his claim for the 27 days.

After the contract was finished on October 10, 1934, plaintiff requested an extension of time of 37 additional days, next discussed, but this was for a cause other than the delay in furnishing the drawings for the millwork and in approving the drawings and samples of the granite. The extension of time of 37 additional days was not granted, but his letter of October 10, 1934 is further evidence of the fact that plaintiff had waived and abandoned his claim for the 27 days' delay.

(7) *37 days' delay due to the reluctance of subcontractors to fulfill their contracts after the expiration of the original period of the prime contract*

Prior to the time that the building was ready for the work to be done by some of the subcontractors, the Codes of Fair Competition under the National Industrial Recovery Act

had been adopted, increasing labor and material costs; in addition, the Civil Works Administration had begun a number of projects in the vicinity of plaintiff's contract increasing the demand for labor which also increased labor costs. Because of these conditions, some of the subcontractors refused to perform their contracts for the amounts originally agreed upon, and plaintiff had to threaten suits against them in order to compel them to do so, and in some instances had to pay them more than the original contract price. The commissioner has found, and we also have found, that this resulted in delays aggregating 37 days.

However, plaintiff is not entitled to recover therefor, because he did not notify the contracting officer of these delays at the time they occurred. He made no claim therefor until after the job was completed on October 10, 1934. The contract required plaintiff to notify the contracting officer of the cause and extent of the delay within ten days thereafter. He failed to comply with this provision of the contract, and under the Supreme Court's decision in *Plumley* v. *United States* 226 U. S. 545, he is not entitled to recover therefor.

It is true that the provision of the contract requiring notice of the delay is in the same article which makes the contracting officer's decision on extensions of time for delays final and conclusive, and that we have held, *supra*, that his findings are not conclusive in a suit by the plaintiff to recover damages for delay. We said that this article had reference to the assessment of liquidated damages against the contractor and that it could not have reference to actions against the defendant for damages for delays because, if so, it would be in conflict with the Act of Congress conferring on this court and, in certain cases, on the district courts jurisdiction of suits against the United States. However, a requirement that notice of a delay be given as a condition precedent to the maintenance of a suit against the United States for resulting damages would in no way impinge upon the jurisdiction conferred on this court; it would not result in substituting a forum other than the one prescribed by Congress for the trial of suits against the Government. On the other hand, it does serve the useful purpose of giving the person re-

sponsible for the delay the opportunity of removing the cause of it and thus minimizing the damage. The validity of such a provision cannot be questioned.

Although we think it is the better view that the whole article has reference only to the assessment of liquidated damages, we are constrained by the Supreme Court's decision in the *Plumley* case, *supra*, to hold it applicable, so far as notice of the delay is concerned, to suits to recover damages therefor.

We have found that plaintiff is entitled to recover for defendant's delay in notifying him of the depth to which it wanted the footings lowered, although plaintiff did not notify the contracting officer of this delay, because this was a matter within the knowledge of the contracting officer and, hence, notification was unnecessary. So far as the record shows, the contracting officer had no information about plaintiff's difficulty with his subcontractors. Had he been advised of it he might have straightened the matter out without any delay.

(8) *27 days' delay due to defendant's failure to promptly make final inspection of the building*

The specifications required the contractor to give the supervising architect from 7 to 10 days' advance written notice of the date when the building would be ready for final inspection. Plaintiff gave such notice on September 17, 1934, stating that the building would be ready for final inspection on September 27, 1934. Inspection by the general inspector was not made until October 16, 1934, and inspection by the mechanical inspector was not made until October 24, 1934. Both of them made lists of minor omissions and defects, which were corrected by November 26, 1934. Plaintiff claims 27 days' delay on account of this.

Defendant did fail to make inspection promptly, but we are of opinion that this did not result in any damage to plaintiff, since the defendant, with plaintiff's consent, occupied the building on October 1, 1934, and thereby relieved plaintiff of any responsibility for the care of the building prior to the date of making inspections. No work was

expected of him until after the inspections were made, and, therefore, he did not have to keep on the job his superintendent or workmen, and, so far as we are able to see, was not put to any extra expense on account thereof.

In addition to this, plaintiff made no complaint to the contracting officer of this delay in inspection. In *Plumley v. United States*, *supra*, it was held that it was necessary that plaintiff notify the contracting officer that he would be damaged if inspection was not promptly made. Evidently the contracting officer in the instant case did not think it made a great deal of difference when final inspection was made, since the building was already occupied; he evidently did not think that the plaintiff would be hurt by any delay in inspection, and since plaintiff did not notify the contracting officer that he was being damaged thereby, we think he is not entitled to recover, even if he in fact suffered any damage at all.

DAMAGES

Plaintiff claims damages as a result of these delays as follows: (1) cost of superintendence and job overhead; (2) equipment rentals; (3) increased price of materials; (4) loss of discounts for prompt payment of bills; (5) extra cost of doing certain work; (6) additional travel expenses required; (7) extra cost due to inefficiency of labor; (8) loss on insurance policy; (9) extra cost of subcontracts; (10) claim for extra photographs.

(1) *Cost of superintendence and job overhead.*—The only controversy about this element of damage is the reasonable value of plaintiff's services as his own superintendent and engineer on the job. The commissioner has allowed $375.00 a month for these services. The proof shows, however, that immediately prior to the instant contract plaintiff was drawing a salary of $600.00 a month as superintendent for the Pierce Steel Pile Corporation, plus $115.00 a month for a room at the Shoreham Hotel, and that at the time of testifying he was acting as superintendent for the C. & R. Construction Company of Boston, where he drew a salary of $600.00 a month, plus a commission of 3 percent of the profit

made on the job. In view of this, and since plaintiff on this particular job was acting both as his own superintendent and engineer, we think his services were reasonably worth not less than $750.00 a month. It is agreed that the other overhead costs were $4.95 a day. This makes a total daily cost of superintendence and overhead of $29.95.

We have found that the defendant is responsible for the damages suffered by plaintiff for 238 days of delay caused by the defendant. At $29.95 a day for the cost of superintendence and job overhead he was damaged on this account in the total sum of $7,128.10. He is entitled to recover this amount.

(2) *Equipment rentals.*—Plaintiff claims damages for the time certain of his equipment remained idle on account of defendant's delays. This equipment was a Rex mixer, a Chevrolet coupe, a saw rig, a derrick crab, 10,000 square feet of floor pans, small tools, and office furniture. He assumes that all this equipment was idle for the entire period of the delays, but there is no proof of this. The work was not at a complete standstill for all this time and some of this equipment may have been used for a part of the time.

The proof tends to show that the job could have been completed 238 days earlier than it was except for defendant's delays, and if so, the equipment could have been used on other jobs or rented much earlier than it was. But, whether or not all this equipment was needed on this job until the end of the contract, or how much longer it was necessary on this job than it would have been had there been no delays, the proof does not show.

The actual damage must be proven more definitely than has been done in this case. Cf. *Eastern Contracting Co.* v. *United States*, No. 44226, C. Cls. decided October 5, 1942. However, the defendant's delays have been many and long and inexcusable, and it is beyond doubt plaintiff has been greatly damaged thereby, and in part by the loss of use of this equipment.

This was plaintiff's first contract; formerly he had worked as superintendent for other contractors. When he entered upon the work he had enough money saved up to pay his operating costs and to discount his bills. The purchase price

of his equipment was payable in installments, but on account of defendant's repeated delays he could not keep up his payments and lost his equipment, for which he had paid $4,405.25 (exclusive of the office furniture). According to plaintiff's figures the depreciation, upkeep, and interest on the investment in this equipment (exclusive of the office furniture) during the original contract time would have been $3,096.00. If this be deducted from the cost of the equipment, plaintiff would have suffered a loss of $1,309.25; but we think plaintiff's figure on the depreciation, etc., is high. We think $1,905.25 is more accurate. Deducting this from the cost of the equipment would result in a loss of $2,500.00.

Under the peculiar facts of this case we think plaintiff should recover on this account the sum of $2,500.00.

(3) *Increased price of materials.*—As a result of the adoption of the Codes of Fair Competition under the National Industrial Recovery Act in the early part of 1934 the cost of building materials substantially increased over 1933 prices. Since plaintiff's contract had to be largely performed thereafter on account of defendant's delays, plaintiff's material costs were increased by $644.64. He is entitled to recover this amount.

(4) *Loss of discounts for prompt payment of bills.*—At the beginning of the job plaintiff discounted his bills for materials, and would have had sufficient funds to do so throughout the job except for the delays, but these delays so depleted his resources by delaying him in securing progress payments from the defendant that he was unable to continue to discount his bills, and he lost in this way $302.30. This he is entitled to recover.

(5) *Extra cost of doing certain work.*—On account of the delays, making it impossible for plaintiff to do his work in an orderly manner, he was put to extra expense of doing certain work in the amount of $1,907.05. He is entitled to recover this amount.

(6) *Additional travel expense.*—The commissioner found that the plaintiff was required to spend about $576.00 on travel expense to Clarksburg, West Virginia, and Washington, D. C., in efforts to prevent or minimize further delays.

The defendant takes no exception thereto. He is entitled to recover this item.

(7) *Extra cost due to inefficiency of labor.*—The commissioner has found that plaintiff's proof is not sufficient to support this item. We agree.

(8) *Loss on insurance policy.*—On account of defendant's delays and the consequent depletion of plaintiff's financial resources he was compelled to surrender a life insurance policy in order to realize thereon its cash value. He claims a loss on the surrender of this policy as an element of his damage, but in our opinion he sustained no loss thereon. Plaintiff no doubt did not wish to surrender this policy when he did, but was forced to do so by defendant's delays, but he suffered no monetary loss on this account. He received its full cash value.

(9) *Extra cost of subcontracts.*—We have held, *supra*, that plaintiff is not entitled to recover on account of this item.

(10) *Claim for extra photographs.*—Plaintiff claims the cost of taking photographs to sustain his claim for expenses incurred for erecting an exterior masonry scaffold and for removing and rebuilding the boiler pit. This is an expense of prosecuting his claim. Such expense is not an element of damage for which recovery may be had.

LIQUIDATED DAMAGES DEDUCTED

The contract time was extended by the contracting officer until September 7, 1934. The building was occupied by the defendant on October 1, 1934. Liquidated damages were assessed for the 24 days between the expiration of the contract time and the occupation of the building in the amount of $720.00. This amount the plaintiff seeks to recover.

The contracting officer found that the completion of the building had been delayed this length of time due to the failure of the plaintiff to give the work his personal supervision or to have on the job a competent foreman or superintendent. The Secretary of the Treasury approved the findings of the contracting officer on February 12, 1935.

The commissioner has found that the work could have been completed 24 days earlier had the work been given adequate

supervision, but he also found that the plaintiff, who was his own superintendent, was unable to give the work the necessary supervision on account of the defendant's previous delays, which necessitated his absence from the work in an effort to establish new lines of credit and to locate his subcontractors and induce them to go on with the work. This is not denied by the defendant. As we stated above, plaintiff's resources were adequate for him to have completed the job and to have discounted his bills had he not been delayed by the defendant. We have also found that the subcontractors were reluctant to go on with the work because of the increased costs resulting from the enactment of the National Industrial Recovery Act and the adoption after the original completion date of the contract of Codes of Fair Competition. Plaintiff, therefore, was prevented from giving the work adequate supervision by the acts of the defendant in delaying the completion of the job.

Had an extension of time been granted for the 18 days during which the work was suspended while defendant's representatives were making up their minds to what depth they wanted the footings lowered, the completion date would have been September 25, 1934. There is no conceivable reason why this extension should not have been granted. It was a delay caused in part by latent subsurface conditions, and in part by the failure of defendant's representatives to act promptly. The plaintiff was in no possible way responsible therefor. Under articles 4 and 9 he was clearly entitled to an extension of these 18 days. Had this extension been granted, the defendant's occupation of the building would have been only five or six days after the completion date.

The assessment of liquidated damages under all these circumstances was altogether unreasonable and must be set aside as arbitrary.

The plaintiff is entitled to recover $720.00 on account of liquidated damages deducted.

CLAIM FOR COST OF REMOVING AND INSTALLING ROOF

Plaintiff's last claim is for the cost of removing a tin roof and installing a copper one.

The contract drawings specified a tin roof over the load-

ing platform. In the middle of the drawing showing this roof there was written in large capital letters the words "TIN ROOF." The specifications said nothing about the kind of roofing for this loading platform, although they did provide for the kind of roofing for other portions of the building.

Prior to installing the roof the plaintiff sent a sample of the tin he proposed to use for this purpose to the supervising architect for approval. It was returned approved. Plaintiff then proceeded to install the tin roof. This was done under the supervision of the construction engineer, and at the end of the month plaintiff was paid for the roof.

About a month later a traveling inspector from the supervising architect's office told plaintiff that this roof should have been of copper instead of tin, because the specifications provided that "all exterior sheet metal work shall be of copper." Plaintiff protested. The construction engineer wrote the supervising architect for instructions. The supervising architect then reversed his former interpretation of the plans and specifications and held that a copper roof was required, and required plaintiff to remove the tin roof and replace it with copper. This plaintiff did under protest and at a cost of $319.44.

The drawings and specifications, properly interpreted, plainly call for a tin roof. The provision in the specifications that "all exterior sheet metal work shall be of copper" is a general provision. The provision in the drawings calling for a "tin roof" is a specific provision relating to this particular exterior sheet metal. Anybody reading the specifications and looking at the drawings would of necessity come to the conclusion that it was intended that this roof should be of tin. The supervising architect was of this opinion when plaintiff presented to him the sample of the tin he proposed to use for this roof.

The defendant says, however, that the interpretation of the plans and specifications by the contracting officer is made final and conclusive. So it is. But the contracting officer at first interpreted them to call for a tin roof. There is nothing in the contract or the specifications that gives him the right to reverse his ruling after the work has been done and to require plaintiff to tear out work already done in

accordance with his instructions and replace it with something else.

We are of the opinion that he was bound by his original ruling and was not permitted under the contract to change it later after the work had already been done in accordance with his instructions.

The plaintiff is entitled to recover on this item the sum of $319.44.

The plaintiff is entitled to recover of the defendant the total sum of $14,097.53, for which judgment will be rendered. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

GEORGE L. COLEMAN v. THE UNITED STATES

[No. 45810. Decided June 7, 1943*]

On Defendant's Demurrer

Government salary applicable to office to which appointment is made, independent of duties performed.—One who holds office is entitled to no more than the salary of the office to which he was appointed, whether or not he performs the duties of an office of higher grade. *United States* v. *McLean*, 95 U. S. 750, cited.

Same.—The salaries fixed by Congress are the salaries payable to those who hold such offices and not to those who perform the duties thereof.

Same; appointment to office.—One may hold office only by appointment by his superior, and the law vests in the superior the discretion as to whether or not appointment to the office shall be made.

See also *Bechler* v. *United States*, 34 C. Cls. 400, 421; *Morey* v. *United States*, 35 C. Cls. 603; *Barrett* v. *United States*, 37 C. Cls. 44, 48; *Jackson* v. *United States*, 42 C. Cls. 39.

Mr. Fred B. Rhodes for the plaintiff. *Mr. Alexander Padowitz* and *Rhodes, Klepinger and Rhodes* were on the brief.

Mr. E. E. Ellison, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

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*Plaintiff's motion to set aside order of dismissal overruled July 21, 1943.

The facts sufficiently appear from the opinion of the court.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff sues to recover the sum of $1,080.00, the difference between the pay received by him as a garageman-driver and the pay of a driver-mechanic, to which he says he is entitled under the Reclassification Act of 1925, c. 368, 43 Stat. 1060, 1061 (39 U. S. C., sec. 116). His petition alleges that he was appointed a substitute garageman-driver, but that while holding this appointment he was required to and did perform the duties of a driver-mechanic. Because he performed the duties of a driver-mechanic he alleges that he is entitled to the pay of that grade.

The defendant demurs. It is plain that its demurrer must be sustained. Plaintiff is entitled to no more than the salary of the office to which he was appointed, whether or not he performed the duties of an office of a higher grade.

In *United States* v. *McLean*, 95 U. S. 750, a postmaster sued to recover the salary which he insisted should have been fixed for his office by the Postmaster General. This court allowed recovery, but the Supreme Court reversed because it held Congress had conferred on the Postmaster General the authority to fix the salary of the office, and not on this court, and, therefore, it was held claimant was entitled to recover no more than the salary fixed by the Postmaster General. In conclusion the court said:

> * * * Now, if it be conceded that the quarterly returns made on the last day of each quarter, beginning with June 30, 1871, made it the duty of the Postmaster General to make a readjustment immediately on the receipt of the returns, still his readjustment was an executive act, made necessary by the law, in order to perfect any liability of the government. If the executive officer failed to do his duty, he might have been constrained by a *mandamus*. But courts cannot perform executive duties, or treat them as performed when they have been neglected. They cannot enforce rights which are dependent for their existence upon a prior performance by an executive officer of certain duties he has failed to perform. The right asserted by the claimant rests upon a condition unfulfilled. * * *

The principle of this case has been applied many times by this court. See *Belcher* v. *United States*, 34 C. Cls. 400, 421; *Morey* v. *United States*, 35 C. Cls. 603; *Barrett* v. *United States*, 37 C. Cls. 44, 48; *Jackson* v. *United States*, 42 C. Cls. 39.

There are innumerable instances in the Government service where employees of a lower classification perform the duties of a higher classification, but since the above decided cases we know of no instance where suit for the salary of a higher classification has been brought. The salaries fixed by Congress are the salaries payable to those who hold the office and not to those who perform the duties of the office. One may hold the office only by appointment by his superior, and the law vests in the superior the discretion as to whether or not appointment to the office shall be made. Where the plaintiff has received the salary of the office to which he is appointed he has received all to which he is entitled under the law. The plaintiff in this case has received the salary of the office to which he was appointed, to wit, that of a garageman-driver.

Upon the authority of the above cited cases defendant's demurrer is sustained and plaintiff's petition is dismissed. It is so ordered.

MADDEN, *Judge*; LITTLETON, *Judge*; and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

W. A. HAYNES v. THE UNITED STATES

[No. 45724. Decided June 7, 1943]

On the Proofs

Income tax; sale of capital assets; deferred payments on sale of oil and gas leases.—Where plaintiff, on April 17, 1936, along with other stockholders in a corporation which was the owner of oil and gas leases, sold all of the capital stock of such corporation for a cash consideration, divided proportionately among the said stockholders; and where in addition the purchaser agreed to pay a stated sum in deferred monthly payments, proportionately to each

Reporter's Statement of the Case

stockholder, but only to the extent of the value of a stated percentage of the oil and gas produced from the properties involved in the transaction; and where said shares were an asset held by plaintiff for more than five years; it is *held* that the sums received in 1936 and 1937 by the plaintiff under the deferred payments provision of the sale agreement were profits on the sale of a capital asset held more than 5 years and not income

Same.—The monthly payments were the fulfillment of the purchaser's promise to pay rather than the product of property which plaintiff and the other stockholders owned.

Same.—Plaintiff and the other stockholders became unsecured creditors of the purchaser and retained no property interest in either the leases or the wells. *Helvering* v. *O'Donnell*, 303 U. S. 370, cited. *Thomas* v. *Perkins*, 301 U. S. 655, distinguished. See also *Helvering* v. *Elbe Oil Co.*, 303 U. S. 372; *Helvering* v. *Bankline Oil Co.*, 303 U. S. 362.

The Reporter's statement of the case:

Mr. W. W. Spalding for the plaintiff. *Messrs. S. L. Herold* and *Pike Hall* were on the briefs.

Mr. Daniel F. Hickey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact, as follows, upon the stipulation of the parties:

1. Plaintiff is a citizen of the United States and resides at Shreveport in the State of Louisiana.

2. April 17, 1936, plaintiff sold and transferred to the Standard Oil Company of Louisiana (hereinafter referred to as the "purchaser") 567½ shares of the capital stock of the Haynes Production Company, Inc., a corporation organized under the laws of the State of Louisiana. These 567½ shares were part of 1,750 shares, the total number of shares of stock of the Haynes Production Company, Inc. outstanding, all of which shares were sold by the stockholders of that company (hereinafter referred to as the "sellers") to the same purchaser on the same day, April 17, 1936. Attached to the petition in this case as Exhibit A, and now made a part hereof, is a true and correct copy of the written contract under which the sale was made.

For the entire 1,750 shares of said stock, a cash consideration of $3,663,141.04 was paid immediately upon the consummation of the sale on April 17, 1936 by the purchaser to the sellers, which amount was divided among the stockholders proportionately to their stockholdings.

The contract further provided that:

> Vendee further agrees to pay Vendors the sum of Ten Million ($10,000,000.00) Dollars or such part thereof as may become due under the following terms, conditions and stipulations:
>
> It is understood and agreed that the Haynes Production Company, Inc. is the owner of valid and subsisting oil and gas leases bearing upon certain properties situated in the Rodessa field in the Parish of Caddo, State of Louisiana, particularly described on the list hereto attached and made a part thereof, marked Schedule "A", and the Ten Million Dollar Payment above provided for shall be paid in monthly installments, on or before the 20th day of each month, in an amount equal to the sum of the value of the oil and gas, as, if and when produced from said properties, during the preceding month, as herein below set out:
>
> Three-sixteenths (3/16) of Seven-eighths (7/8) of the value of all the oil produced and saved from flowing wells on said properties, and Two-sixteenths (2/16) of Seven-eighths (7/8) of the value of all the oil produced and saved from wells where mechanical or other methods, except acidizing, must be used in order to bring or assist in bringing the oil to the surface.

The foregoing provision is hereinafter referred to as the deferred payment provision.

3. Pursuant to the terms of the deferred payment provision, plaintiff was paid by the purchaser in 1936 the sum of $142,432.94, representing his fractional part of the income received from oil and gas produced on the property. In his income tax return for that year, plaintiff included in gross income his share of the cash consideration paid by the purchaser to him as one of the sellers, and also this amount of $142,432.94. In the return, plaintiff treated the sale of the stock of Haynes Production Company, Inc. to the purchaser as a transaction that fell within Section 117 of the Revenue Act of 1936, and the amount just mentioned ($142,432.94) plus plaintiff's share of the cash consideration received at

the time of the sale, less the basis of the stock (567½ shares) in plaintiff's hands, was returned by him in his income tax return as gross income that was properly to be reduced to 40 percent thereof under Section 117(a) of the Revenue Act of 1936. The shares were an asset that had been held by plaintiff for more than five years. All income taxes shown due on that return were paid by plaintiff in 1937.

4. In the audit of plaintiff's 1936 return, the representatives of the Bureau of Internal Revenue rejected plaintiff's theory of the transaction and treated the amount of $142,-432.94 as ordinary income not subject to the provisions of Section 117 of the Revenue Act of 1936. Those representatives held that the entire amount of $142,432.94, rather than 40 percent thereof, was subject to income taxation to plaintiff, which had the effect of increasing plaintiff's taxable income in the amount of $85,459.76 less a deduction of $39,169.06 for depletion. A letter from the Bureau of Internal Revenue was sent to plaintiff stating that conclusion. March 18, 1938, plaintiff filed with such representatives of the Bureau of Internal Revenue his formal protest against the inclusion of the amount of $85,459.76 in his taxable income of 1936. Thereafter, a hearing was had on that protest before the representatives of the Bureau of Internal Revenue, with the result that they adhered to their previous ruling with respect of the proper classification of the $142,432.94.

Thereafter, on July 20, 1938 and October 12, 1938, upon receipt of notices and demands from the Collector of Internal Revenue, plaintiff paid under protest $35,300.60 with interest of $3,290.51, total $38,591.11, as a deficiency of income taxes for 1936, of which amount $34,255.13 with interest of $3,-206.84, total $37,461.97, was attributable to the classification of the amount of $142,432.94 by the representatives of the Bureau of Internal Revenue.

5. Within less than two years after the payment by plaintiff of the deficiency of income taxes for 1936, he filed with the Bureau of Internal Revenue his refund claim for $34,-255.13 with interest, based on the same grounds for recovery as are set forth in the petition in this case. October 26, 1940,

the Commissioner of Internal Revenue formally rejected and denied the refund claim in full.

6. In his income-tax return for 1937, plaintiff included in gross income his share of the amounts paid by the purchaser, pursuant to the deferred payment provision of the contract of April 17, 1936. The amount of this item for 1937 was $149,753.27. In his return for 1937, plaintiff treated the amount of $149,753.27 as a part of the consideration for the sale of a capital asset within the meaning of Section 117 of the Revenue Act of 1936, and returned it as gross income that was properly to be reduced to 40 percent thereof under Section 117(a) of the Revenue Act of 1936. All income taxes shown due on that return were paid by plaintiff in 1938.

7. In the audit of plaintiff's 1937 return, the representatives of the Bureau of Internal Revenue treated the amount of $149,753.27 as ordinary income not subject to the provisions of Section 117 of the Revenue Act of 1936. They accordingly held that the entire amount of $149,753.27, rather than 40 percent thereof, was subject to income taxation to plaintiff, which had the effect of increasing his taxable income in the amount of $89,851.96 less a deduction of $41,-182.15 for depletion. A letter was written to plaintiff to that effect.

Thereafter, to-wit, on the 2nd of May, 1939, upon receipt of notice and demand from the Collector of Internal Revenue, plaintiff paid under protest to that officer $28,270.17 with interest of $1,921.21, total $30,191.38, less a refund of $4.65, making a total net deficiency so paid of $30,186.73, for 1937, all of which amount was attributable to the classification of the $149,753.27 by the representatives of the Bureau of Internal Revenue.

8. Within less than two years after the payment by plaintiff of the deficiency for 1937, plaintiff filed with the Bureau of Internal Revenue his refund claim for $28,270.17 with interest, based on the same grounds for recovery as are set forth in the petition in this case. On December 30, 1941, the Commissioner of Internal Revenue formally rejected and denied that refund claim in full.

9. Plaintiff has at all times borne true allegiance to the United States. He is the true and lawful owner of the claim sued on herein, which has not been assigned. No claim for the amount involved in this proceeding has been made except as herein stated.

The court decided that the plaintiff was entitled to recover.

Madden, *Judge*, delivered the opinion of the court:

On April 17, 1936, plaintiff sold his 567½ shares of the stock of the Haynes Production Company to the Standard Oil Company of Louisiana. On the same day all the other stockholders in the Haynes Co. also sold their shares, to Standard, the total number of all the shares, including plaintiff's being 1,750. For all the shares, Standard paid in cash $3,663,141.04, which was divided ratably among the sellers, and promised to pay $10,000,000 more, in monthly deferred payments but only to the extent of the value of three-sixteenths of seven-eighths of the oil and gas produced from the properties of the Haynes Production Company. When the properties had ceased to produce, the $10,000,000 was to be regarded as having been paid.

In 1936 plaintiff received his pro rata share of the lump sum payment of cash, and in addition, monthly payments amounting in all to $142,432.94 under the deferred payment promise of Standard. In 1937 plaintiff received monthly deferred payments totaling $149,753.27. In making his income tax return for 1936 plaintiff treated the cash payment and the monthly deferred payments received by him that year as consideration paid him for the conveyance of a capital asset, the shares in the Haynes Production Co., held by him for more than five years, and treated the profit on the transaction as being, therefore, not fully taxable but only taxable to the extent of 40%.[1] In his 1937 return he treated the monthly deferred payments received by him during that year, in the same way.

The Commissioner of Internal Revenue, however, assessed a tax on plaintiff on the basis that all of these deferred monthly payments should be regarded as current income of

[1] Section 117 of the Revenue Act of 1936; 26 U. S. C., Int. Rev. Acts, p. 707.

plaintiff, and not as a part of the sale price of a capital asset. He therefore treated the full amount of the monthly payments as income, rather than only 40% of them, but allowed plaintiff a deduction for depletion, at the usual rate applicable to oil and gas properties, and taxed plaintiff accordingly. Plaintiff paid the taxes as assessed and filed claims for refund. He sues here to recover the alleged overpayment.

The Government concedes that the transfer by plaintiff of his stock was a sale of a capital asset; that the cash payment received by plaintiff was a part of the consideration for the sale, and that the arrangement for further payments was a further consideration for the sale. It contends that the value, on April 17, 1936, of the conditional promise for the deferred payments should have been capitalized and added to the cash payment, and if the sum amounted to more than plaintiff had paid for the stock, 40% of that excess should have been taxed to plaintiff as a capital gain. Plaintiff was not assessed on that basis. But, the Government contends, even if he had been, his monthly payments received under the promise of the purchaser to make deferred payments would have been taxable as current income, as the Commissioner in fact taxed them.

The stated basis for the Government's position is that plaintiff, when he sold his stock received cash and an interest in oil and gas properties to the extent of three-sixteenths of seven-eighths of their production, until they had produced plaintiff's pro rata share of the $10,000,000; that the value of that interest, at the time plaintiff received it, was a part of the price received by plaintiff for the sale of his capital asset; but that the income which plaintiff later received, as the product of that interest, was current income from an interest owned by plaintiff rather than payment for the stock.

We think that the Government's analysis of the transaction is fallacious. In the first place, plaintiff was given no interest in the oil and gas producing property or in any other property, within any legal meaning of the word interest. He became a mere general creditor of the Standard Company, the amount of his claim to be measured by

the production of certain properties in which he had no ownership nor lien. Plaintiff's "interest" in the production properties was the human interest which one has in his debtor's sources of income from which to pay the debt, sharpened by the conditional nature of the promise to pay, which was to be satisfied not only by payment, but also by the failure of the properties to produce further oil and gas. But plaintiff owned nothing as the proceeds of the sale except the cash received and the Standard Company's promise. See *Helvering* v. *O'Donnell*, 303 U. S. 370.

Even if plaintiff had been given a lien upon the property, or upon the proceeds of the production, to secure the payment of the promised money, still the payments received in discharge of the promise would have been payments made for plaintiff's capital asset, the stock, rather than current income. The payments would not have been the product of the lien, but rather the agreed consideration for the sale, secured by the lien.

The question of how to treat, for income tax purposes, persons who stand in various economic relations to oil and gas producing properties, has been much litigated. Many of the cases reaching the Supreme Court have involved the depletion problem, whether the taxpayer stood in such a relation to the property as to be entitled to claim a depletion allowance. The cases are cited and many of them summarized in the opinion of the court in *Anderson* v. *Helvering*, 310 U. S. 404. The court there said "It is settled that the same basic issue determines both to whom income derived from the production of oil and gas is taxable and to whom a deduction for depletion is allowable. That issue is, who has a capital investment in the oil and gas in place and what is the extent of his interest."

Even with the aid of this generalization, the solution of particular cases is not easy. In *Thomas* v. *Perkins*, 301 U. S. 655, Hammonds and Branson, owners of oil and gas leases, assigned "all our rights, title, and interest in and to said leases and rights thereunder" to Perkins, the instrument of assignment providing that it was made in consideration of a cash payment, and of the further sum of $395,000 to be paid out of one-fourth of the oil produced from the

leases "which payments shall be made by the pipe line company or other purchaser of said oil." It further provided that the $395,000 was payable only out of the oil produced, and was not to be a personal obligation of Perkins. The instrument did not purport to reserve a lien. Perkins, the assignee, drilled producing wells on the leases. The pipe line companies which purchased the oil required division orders to be made showing the shares of all parties in the oil, and they paid Hammonds and Branson, the assignors, directly for their one-fourth share.

The Commissioner of Internal Revenue taxed Perkins, the assignee, upon the whole income from the leases, including the money paid to the assignors by the purchasers of the oil. The Supreme Court held that this was wrong. It held that, in spite of the unqualified language of the assignment, the instrument as a whole, including the lack of any personal obligation to pay the money, or the taking of any security for its payment, and the conduct of the parties with reference to the division orders, showed that the assignors "intended to withhold from the operation of the grant one-fourth of the oil to be produced and saved up to an amount sufficient when sold to yield $395,000." The payments made to the assignors, Hammonds and Branson, should therefore have been taxed to them, and were not taxable to Perkins, the assignee.

In our case, as in the Perkins case, the sale by plaintiff and the other stockholders to Standard was on its face unqualified, there was no personal obligation upon Standard to pay the $10,000,000 except as the wells produced oil enough to pay it, and there was no lien or other security reserved or taken by plaintiff. In the Perkins case, in the presence of these same factors, the court was at pains to spell out a reservation of ownership by the assignors in the one-fourth of the oil, the sale price of which the assignors were to receive. Thus the assignors were given a property interest in the leases, and the assignee was exempted from taxation upon the proceeds of that interest.

While in our case plaintiff had exactly the same kind of financial interest in the oil leases and their production that the assignors had in the Perkins case, yet it is not

possible in our case to call that interest an ownership. Plaintiff could not have, technically, reserved by implication an interest in the leases and their production, for he had never owned them. To be sure, he and the other stockholders had owned the Haynes Production Company, which had owned the leases. But even if we were to treat the corporate organization as only a fiction, we think there is no indication of any intent here that plaintiff and the other sellers of the stock were to keep, or get, any property interest in the leases or wells after the sale of the stock to Standard. The financial dependability of Standard probably made them willing to become its unsecured creditors for so much money. In any event, we think that was their position and that, as we have said above, the monthly payments were the fulfillment of Standard's promise, rather than the product of property which plaintiff and the other stockholders owned. See *Helvering* v. *O'Donnell*, *supra*, *Helvering* v. *Elbe Oil Co.*, 303 U. S. 372, *Helvering* v. *Bankline Oil Co.*, 303 U. S. 362.

The sums received by plaintiff in 1936 and 1937 under the deferred payments provision of the sale to Standard were, therefore, profits on the sale of a capital asset held more than five years, and not income. Plaintiff was overtaxed and may recover the excess with interest. The determination of the amount of plaintiff's judgment may await the filing of a stipulation by the parties. It is so ordered.

WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge;* and LITTLETON, *Judge*, took no part in the decision of this case.

In this case, in accordance with stipulation filed by the parties, judgment was entered October 4, 1943, for the plaintiff in the sum of $67,648.70, with interest on $37,461.97, a part thereof, from October 14, 1938, and on $30,186.73, the balance thereof, from May 2, 1939, according to law.

CAPE ANN GRANITE CO., INC. v. THE UNITED STATES

[No. 44901. Decided October 4, 1943. Plaintiff's motion for new trial overruled November 1, 1943.]*

On the Proofs

Government contract; extensions of time; unforeseeable causes; weather.—Where in the specifications accompanying the Government's invitation to bid, bidders were put on notice to take into account the uncertainty of the weather; and where the weather was not more severe than that ordinarily encountered; it is *held* that such weather as was encountered was not unforeseeable and plaintiff was not entitled to an extension of time on this account. See *United States* v. *Brooks-Callaway*, 318 U. S. 120; and *Caribbean Engineering Co.* v. *United States*, 97 C. Cls. 195.

Same; failure of contracting officer and head of department to make decisions a breach of contract.—Where the contract placed upon the contracting officer and the head of the department the duty of making decisions, their failure to do so is a breach of contract, which authorizes the contractor to bring suit in the Court of Claims to recover any amount to which the contractor is entitled under the contract. See *James McHugh Sons, Inc.* v. *United States*, 99 C. Cls. 414.

Same; misrepresentations by defendant.—Where specifications represented that "There are no bridges or other obstructions between the proposed work and the sea," and maps, to which reference was made, accurately showed a sand bar in front of the entrance to the harbor, there was no misrepresentation of conditions at the site.

Same; equitable adjustment; changed conditions.—Where the specifications showed that there was a minimum depth of 10 feet in the entrance channel to a harbor and a survey after a flood showed that there was an available depth of 11 feet at mean low water through the entrance channel, and the shallowest depth on the range line was 9.5 feet, there had been no material change in subsurface conditions entitling the plaintiff to an equitable adjustment under Article 4 of the contract.

The Reporter's statement of the case:

Mr. Horace M. Gray for the plaintiff. *Mr. Charles E. Wythe* was on the brief.

Mr. G. C. Sherrod, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

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*Plaintiff's petition for writ of certiorari denied March 27, 1944.

The court made special findings of fact as follows:

1. Plaintiff is a corporation organized under the laws of the State of Massachusetts.

2. On August 17, 1935, defendant, through the United States Engineer Office, War Department, Boston, Massachusetts, issued an invitation for bids (standard Government form) "for furnishing all labor and materials and performing all work for repairing the jetties at Newburyport Harbor, Mass." A pertinent excerpt from such invitation follows:

> The map which will become a part of this contract is designated in paragraph 6 of the specifications. A reference map marked "Newburyport Harbor, Massachusetts, Repairs to Jetties at Entrance to Harbor" is attached hereto.

3. Plaintiff's bid was accepted and the standard Government form of contract (construction) was entered into on October 11, 1935. The contract provided that the work should be completed within 365 calendar days after receipt of notice to proceed. Plaintiff received this notice on November 7, 1935, which fixed March 5, 1937, as the completion date. Plaintiff was required by the contract to begin work within twenty days after receipt of notice to proceed. Prior to this date and on November 15, 1935, the contracting officer suspended all work on the project until April 1, 1936. This fixed the completion date as May 9, 1937. The work was completed and accepted by the defendant on December 22, 1937.

4. Plaintiff claims damages for two alleged misrepresentations as to conditions at the site of the work and it claims increased costs due to changed subsurface conditions, and it claims the right to recover liquidated damages deducted for delay.

5. The first alleged misrepresentation was with respect to a sand bar at the entrance to the harbor where the work was to be done. The facts relating thereto are as follows:

(a) The map accompanying the invitation for bids showed a channel in the harbor 18 feet deep. This channel extended slightly beyond the end of the jetties. It did not show the sand bar outside the entrance to the harbor.

(b) The first paragraph of the specifications reads as follows:

> 1. *Location.*—Newburyport Harbor lies at the mouth of the Merrimack River, Massachusetts, and is situated about 56 miles by water north of Boston. The entrance to the harbor lies between Salisbury Beach on the north and Plum Island on the south, from which points of land the north and south jetties, referred to in these specifications, have been constructed. The proposed work is on these jetties. The locality is shown on U. S. Coast & Geodetic Survey charts Nos. 331 and 1206.

The chart therein referred to showed a sand bar in front of the entrance to the harbor, the depth of the water over which varied from 7 to 11 feet. The channel within the harbor was shown to be substantially as indicated on the map attached to the invitation for bids.

(c) Paragraph 7 of the specifications reads as follows:

> 7. *Physical Data.*—The mean range of tide is 7.9 feet. The work is exposed to severe easterly storms. There are no bridges or other obstructions between the proposed work and the sea. The tidal currents have an average velocity of 2.1 miles per hour, which might have some effect on contract operations.

(d) The invitation for bids referred bidders to the Standard Government Instructions to Bidders. The first paragraph of these instructions reads as follows:

> *Preparation of bids.* * * * Special care should be exercised in the preparation of bids. Bidders must make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies. * * *

(e) The depth of the water over the sand bar at the time the contract was entered into was substantially the same as that shown on the chart of the United States Coast and Geodetic Survey chart, above referred to.

(f) It was well known among mariners operating along that section of the New England coast that there was a submerged and shifting sand bar in the mouth of the Merrimack River and that navigation in Newburyport Harbor was always tedious and usually difficult for those who were

thoroughly familiar with it and often dangerous for those who were not.

The United States Coast Pilot, published by the Coast and Geodetic Survey of the Department of Commerce, in 1933 (Atlantic coast, Section A, St. Croix River to Cape Cod, at page 205) contained the following:

> Merrimack River and Newburyport Harbor, Chart 331.
>
> Merrimack River is the largest and most important river in the eastern part of Massachusetts. It is the approach by water to the cities of Newburyport and Haverhill, and the towns of Amesbury, Merrimackport, Groveland, and Bradford, and is used by vessels of 9 foot (2.7 M.) draft at high water up to Haverhill, and about 15 foot (4.6 M.) draft at high water to Newburyport.
>
> The river is seldom entered for refuge, but the towns on its banks have some coastwise trade, mostly in coal and oil. The river is charted to a point 2 miles above Newburyport.
>
> The entrance is obstructed by a shifting bar with 9 to 12 feet (2.7 to 3.7 M.) over it (according to the condition of the bar), which is dangerous to cross in heavy weather. The tenders of the lighthouse service cross the bar at half tide, but always send a launch ahead to locate the best water. The whole entrance breaks in easterly gales.
>
> It is marked by Newburyport Lighthouse on its southern side and two range lights on its northern side in addition to the buoys. The range does not always lead to the best water across the bar and within the jetties, and the buoys should be followed. Jetties with an opening 1,000 feet wide between the ends have been built from both points at the entrance up to the bar.

(g) Prior to September 14, 1937, the plaintiff made a number of requests to be allowed to suspend operations and for extensions of time on account of what it called "unworkable conditions," but not until this date did it complain of the existence of this bar.

6. The facts with reference to the velocity of the tidal current are as follows:

(a) Paragraph 7 of the specifications, quoted above, reads as follows:

> The mean range of tide is 7.9 feet. The work is exposed to severe easterly storms. There are no bridges or other obstructions between the proposed work and the sea. The tidal currents have an average velocity of 2.1 miles per hour, which might have some effect on contract operations.

(b) Investigation of the velocity of the current made during the progress of the work showed that it had an average velocity throughout the tidal cycle of 2.08 miles per hour. This was its actual velocity.

7. The facts relating to changed conditions in the sand bar are as set out in finding 5 above, and also as follows:

(a) In March 1936 the Merrimack River rose to flood stages higher than usual, and on July 1, 1936, the Department of Commerce issued a bulletin, a part of which reads as follows:

> Merrimack River, Massachusetts: Changed Channel Conditions: Caution.
>
> From the bar at the mouth of the river to Haverhill numerous shoals exist and changes have taken place due to floods which occurred last spring.
>
> Navigation of the river is extremely dangerous even for small boats and should not be attempted without local knowledge of existing conditions and extreme caution. There is a depth of about 4 feet over the bar at low water and the charts cannot be relied upon.
>
> Pending a resurvey of the river, chart 331 will be cancelled. (July 1, 1936.)

(b) A survey of the bar and the depth of the water over it made in July 1936, after the flood in the Merrimack River in the spring of 1936, showed that the depth in the entrance channel was 11 feet at mean low water and that the least depth on the range line was 9.5 feet. At some places on the bar the depth of the water had decreased to as little as 4 feet at mean low water, but the minimum depth in the channel was 9.5 feet.

(c) Articles 3 and 4 of the contract read as follows:

> ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease

in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

ARTICLE 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract.

8. The facts with reference to the assessment of liquidated damages are as follows:

(a) Paragraph 3 of the specifications reads as follows:

3. Commencement, Prosecution, and Completion.—The contractor will be required to commence work under the contract within 20 calendar days after the date of receipt by him of notice to proceed, to prosecute the said work with faithfulness and energy, and to complete it within 365 calendar days after said date of receipt of notice to proceed; * * *

In case of failure on the part of the contractor to complete the work within the time thus determined and agreed upon for its completion, plus any extensions of

time duly granted under Articles 3, 4, 5, and 9 of the contract, the contractor shall pay the Government as liquidated damages the sum of $25.00 for each calendar day of delay until the work is completed or accepted.

No allowance will be made for failure of a bidder correctly to estimate the difficulties attending the execution of the work.

No work will be required during the period between January 1st and February 29th, inclusive. * * *

(b) Article 9 of the contract reads, in part, as follows:

* * * *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: *Provided further*, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

(c) Paragraph 15 of the specifications reads as follows:

15. *Order Of Work.* * * *

The contracting officer shall have the authority to suspend the work wholly or in part for such a period or periods as he may deem necessary due to unsuitable weather or such conditions as are considered unfavorable for the suitable prosecution of the work or for such time as is necessary due to the failure on the part of the contractor to carry out instructions given or perform any of the provisions of the contract. The contractor shall not suspend work without written permission from the contracting officer.

(d) The contractor received notice to proceed on November 7, 1935. Prior to the time plaintiff was required to

commence work on the contract, the contracting officer suspended work thereon until April 1, 1936. The original completion date was March 5, 1937, but the suspension of work until April 1, 1936, extended the completion date to May 9, 1937. The work was completed and accepted by the defendant on December 22, 1937.

(e) The contracting officer deducted liquidated damages at $25.00 a day for 292 days, the length of time elapsed between the original completion date and the time the work was actually completed. The Comptroller General authorized the payment of $1,625.00 on account of liquidated damages deducted, the period of time elapsed between the time the contractor was required to proceed under the original notice to proceed and April 1, 1936, the date fixed by the contracting officer in his letter of November 15, 1936, as the amended date for proceeding.

(f) The work was actually completed 227 days after the amended completion date.

(g) On September 22, 1936, plaintiff requested an extension of time of six months to cover the period from October 1, 1936, to April 1, 1937, during which time it stated bad weather was to be expected. The contracting officer refused to grant a blanket extension.

On October 2, 1936, plaintiff requested authority to temporarily suspend work on account of "unseasonable weather" and "unusually rough seas" and notified the contracting officer that its subcontractor had moved his scows, lighter, and tug boats to Gloucester Harbor. This request was repeated on October 5, 1936. On that date authority was granted for temporary suspension, but the contracting officer specified that "the above permission to suspend operations does not include an extension of time for the completion of the contract unless weather conditions are found upon investigation to have been abnormally severe."

(h) Again on November 2, 1936, plaintiff requested further suspension of operations in a letter reading in part as follows:

> In your letter to us of October 5, 1936, you agreed to allow us to suspend operations on the Newburyport

Breakwater so that we could make certain changes in and repairs to our fleet now lying at Gloucester.

We took advantage of the time at our disposal for repairs to overhaul our steam tugboat "Rocket". * * *

We have entered into negotiations to purchase a diesel engine with the necessary auxiliaries * * *. We regret that these changes to the "Rocket" have taken us so long but we assure you that as soon as these changes have been effected we will resume the placing of stone in the Breakwater at Newburyport and push the job to a speedy conclusion.

We have in the meantime repaired our tugboat the "Beetle" and have done some work on the scows. We, therefore, ask you now that you do not cancel the permission given us to suspend operations * * *.

Our former method of unloading was to moor a floating derrick along the Breakwater and tie a loaded scow along side of this floating derrick. This is a practical method in the height of calm summer weather but it is impractical in the rough weather met with in the months of September, October, November, March, and April. It was to overcome this obstacle that we went ahead with the changes to the "Rocket" * * *.

We ask that the suspension of operations remain in effect until the repairs to the "Rocket" are completed * * *.

Also on December 8, 1936, the plaintiff requested suspension of work until March 1, 1937. On December 10, 1936, the contracting officer wrote plaintiff in part as follows:

> * * * The temporary suspension of work as previously authorized will be continued until March 1, 1937, it being understood of course that this approval does not authorize a commensurate extension of contract time. The specifications required prosecution of the work during all periods of the year other than January and February. If, however, investigation discloses that natural conditions in the vicinity of the work have been so abnormal and unusual as compared to what should normally be expected in this season of the year, the matter of extension of contract time will receive our full consideration.

(i) On April 27, 1937, the plaintiff wrote the contracting officer in part as follows:

> Since commencing work * * * on March 15th, we have been delayed in our work on account of un-

> usually severe weather. We have made every effort to continue this work by transporting the stone by truck to a Newburyport dock and by scows to the harbor * * * but, up to the present writing, we have only been successful in placing four cargoes during the month of March and two cargoes during the month of April.
>
> You readily see that the work was not delayed through any fault or negligence of ours, but it was entirely due to the unusually severe weather.
>
> We, therefore, respectfully request that you give us an additional extension of time of two months.

Again on May 4, 1937, plaintiff wrote him in part as follows:

> We respectfully address you in connection with the delay in the work we are doing in Newburyport, due to the very unusual weather and sea condition.
>
> * * * We have learned that the weather conditions change so rapidly that we would have to have the stone nearer than Gloucester * * *.
>
> We have carefully observed the weather and sea conditions since our start on March 13, 1937 * * *.
>
> The conditions have been so bad during part of April that if we attempted to work on the jetties we would have been endangering the lives of our men * * *.
>
> Attached please find a day-to-day record of the days we could not operate. The possible number of working days from March 13 to March 31, inclusive, would be 16; of this number 10 we were unable to operate. The possible number of working days in April was 26, of which there were 22 in which we were unable to operate.
>
> We respectfully request that you give us an additional extension of time offsetting the unworkable conditions. * * *

The contracting officer replied that he had taken these requests under advisement and would render his decision later.

(j) Again on May 21, 1937, the plaintiff requested an extension of time on account of unseasonable and excessive rains, to which the contracting officer replied that he was studying the matter and would render his decision as soon as possible.

(k) Again on July 7, 1937, plaintiff requested an extension of time. To these requests for extensions the contracting officer replied on August 13, 1937, as follows:

* * * There are in this office certain requests for extensions of time on the contract on the basis of weather and sea conditions at the site. These are being studied and a decision will soon be reached. It appears, meanwhile, that there may be some such extensions justified for these reasons, but the time involved is expected not to account to more than a small degree for the unsatisfactory progress during this working season.

You are hereby directed to place additional plant on the work or otherwise to take such steps as are necessary to complete the work not later than December 31, 1937 * * *.

In this letter he also complained of the lack of progress being made by plaintiff.

On September 14, 1937, plaintiff replied to this letter as follows:

* * * wherein you bring to our attention the fact that the progress of the work of repairing the Newburyport Jetties has not been up to your expectations. In answer to this, we desire to state that the conditions which impeded our progress were entirely beyond our control, namely; (1) subsurface and latent conditions at the site of the work materially differing from those shown on the drawings or indicated on the specification when we bid the job: (2) unusually severe weather and sea conditions; and (3) inability to procure additional and suitable plant because of the reluctance of owners to expose their equipment to the hazardous conditions existing, due to the physical changes at the site of the work since the flood of 1936.

As to the subsurface and latent conditions: At the entrance to the jetties there is a sand bar which does not correspond to the drawing and specifications of the contract, the depth of the water over the bar is considerably less, the depth of the water adjacent to the North and South jetties is less, and the velocity of the Merrimack River is much faster than indicated in the proposal under which this job was bid. Also, the depth of water in the river between the inner harbor at Newburyport and the Jetties is considerably less than it was at the time of the signing of the contract making navigation difficult for our tugs and lighters.

These matters have been brought to your attention from time to time and we again direct your attention to the same, in accordance with the provisions of Article

> 4 of the contract, and accordingly, we respectfully request that these conditions be investigated and that such changes in the drawings and specifications as are necessary be made, and that an increase in cost and adjustment in time resulting from such changes and variations shall be adjusted as provided in Article 3 of the contract. * * *

(1) Again on November 22, 1937, plaintiff requested permission to suspend operations on account of unworkable conditions.

The contracting officer took no final action on these requests for extension of time until long after final settlement had been made on January 6, 1938.

(m) On August 22, 1938, plaintiff wrote the contracting officer asking for final adjustment of the amount due under its contract, including the remission of liquidated damages deducted. The contracting officer replied as follows:

> This is in reply to your letter of August 22, 1938, and numerous letters referred to therein, concerning various requests for extension of time in the completion of your contract, refund of liquidated damages and your contentions that other adjustments are for consideration.
>
> In this connection you are advised that, because of the fact that final payment under your contract was made on January 6, 1938, this office is without authority to make any adjustment involving additional payment without prior approval of the General Accounting Office.
>
> If claim is made for additional compensation, or for refund of amounts deducted as liquidated damages, data in support thereof should be submitted to this office for transmission to the General Accounting Office, through the Chief of Engineers, with the findings and recommendations of the District Engineer.
>
> If such action is contemplated, the entire matter should be presented in one paper and all dates, figures and other data should be given in detail to permit this office to give proper consideration to each contention made.

(n) On September 21, 1938, the plaintiff wrote the contracting officer setting out its claims in detail.

(o) On December 9, 1938, the contracting officer made findings of fact on plaintiff's claims for additional compensation and for refund of liquidated damages retained

and on December 29, 1938, the contracting officer wrote plaintiff denying its various claims. This letter concluded as follows:

> The findings in all investigations occasioned by your complaints, a complete review of which having been made since receiving your letter of September 21, 1938, are summarized as follows:
> (a) That all occasions of lost time over and above those which might be expected under average conditions of weather and sea are attributable to causes entirely within your control.
> (b) That neither for reasons of unusual weather conditions, cognizable under Article 9 of the contract, nor for changed subsurface or latent conditions, cognizable under Article 4 of the contract, does additional compensation appear to be justifiable under the terms of the contract.

(p) On January 20, 1939, the plaintiff prayed an appeal to the Secretary of War from the findings of the contracting officer. This appeal was denied in a letter signed by the Assistant Secretary of War, dated February 2, 1939, the last paragraph of which reads as follows:

> The Chief of Engineers, under whose supervision the work was performed, advises me that your claim was filed subsequent to completion of the contract. Payments in addition to those already made cannot, therefore, be accomplished through Departmental action. The matter must be referred to the General Accounting Office for direct settlement in accordance with the Budget and Accounting Act of 1921. Action to that end will be taken as promptly as a full consideration of the case will permit.

(q) Article 15 of the contract reads as follows:

> ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

(r) Work on these jetties at Newburyport had been previously done in the years 1897, 1899, 1904, 1905, 1907, 1908, 1911, 1912, 1913, 1914, and 1917. In order to ascertain whether or not the weather during the period of plaintiff's contract was unusually severe, the contracting officer made comparisons of reports from Government inspectors on the jobs in the years the present contract was being performed and from the inspectors on the jobs during previous years. The result of these comparisons is set forth in table II of the contracting officer's findings of fact. This table reads as follows:

TABLE II

Number of days of all Newburyport contracts for jetty construction, in all years from 1897 to 1937, inclusive, on which weather and sea conditions were suitable for work

Month	1897	1899	1904	1905	1907	1908	1911	1912	1913	1914	1917	1936	1937	Total	Ave.
March	----	----	----	----	----	----	6	5	----	6	----	----	18	35	8.8
April	----	----	----	----	----	----	7	6	----	8	----	12	5	38	7.6
May	----	----	----	----	----	----	8	----	----	9	----	15	8	40	10.0
June	9	----	----	10	----	9	9	----	----	20	3	12	7	81	10.1
July	14	----	----	15	14	18	13	----	----	13	11	21	14	133	14.8
Aug	17	10	18	13	19	17	18	----	----	15	----	20	20	167	16.7
Sept	12	16	21	17	15	15	6	----	----	15	----	11	12	140	14.0
Oct	13	9	18	----	19	----	8	----	----	----	----	15	9	91	13.0
Nov	19	13	----	----	----	----	10	----	12	----	----	14	8	76	12.7
Dec	14	22	----	----	----	----	11	----	11	----	----	12	6	76	12.7
Totals	----	----	----	----	----	----	----	----	----	----	----	132	107	----	----

The above data show that from April 1 through December 31, 1936, there were a total of 132 work-days when weather and sea conditions were suitable for work as compared with 112 days under average conditions for the same period. For the period March 1, through December 31, 1937, a total of 107 days suitable for work is shown. Under average conditions for the same period, a total of 120.4 work-days is indicated. Thus it appears that weather and sea conditions were better than the average in 1936 but worse than the average in 1937, and that, on the whole, from April 1, 1936, through December 31, 1937, the conditions were better than the average by a total of 7.0 days.

(s) The contracting officer also made a table showing the number of days during the contract period in which weather and sea conditions were suitable for work and the days actually worked. This table is as follows:

TABLE III

Month	Days on which weather and sea conditions were suitable for work			Days on which work was performed			Lost time due to causes other than bad weather and rough sea
	1936	1937	Total	1936	1937	Total	
March	--------	18	18	--------	4	4	14
April	12	5	17	4	3	7	10
May	15	8	23	0	6	6	17
June	12	7	19	12	7	19	0
July	21	14	35	21	9	30	5
Aug	20	20	40	18	10	28	12
Sept	11	12	23	8	11	19	4
Oct	15	9	24	0	8	8	16
Nov	14	8	22	0	7	7	15
Dec	12	6	18	0	2	2	16
Totals	132	107	239	63	67	130	109

(t) The weather during the period of the performance of the contract was not unusually severe. It was not more severe than might reasonably have been expected.

The weather from October to December 1936 was not unusually severe. It was no more severe than might reasonably have been expected.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

The plaintiff entered into a contract with the defendant on October 11, 1935, for the repairing of jetties at the harbor at Newburyport Harbor, Massachusetts. It sues to recover damages for two alleged misrepresentations by the defendant as to the conditions under which the work was to be performed, and for additional costs incurred by it due to changed subsurface conditions, as alleged, and, lastly, to recover liquidated damages deducted.

The alleged misrepresentations are contained in paragraph 7 of the specifications relating to physical data. This paragraph reads:

> The mean range of tide is 7.9 feet. The work is exposed to severe easterly storms. There are no bridges or other obstructions between the proposed work and the sea. The tidal currents have an average velocity of 2.1 miles per hour, which might have some effect on contract operations.

It is alleged that there was a sand bar in front of the jetties at the entrance to the harbor which formed an obstruction contrary to the representations made in the above quoted paragraph. It is also alleged that the tidal currents had an average velocity of from 3½ to 4 knots an hour, contrary to the above representation.

It is not denied that there was a sand bar in front of the jetties at the entrance to the harbor. However, plaintiff was put on notice of its existence by paragraph 1 of the specifications describing the location where the work was to be done. The last sentence of this paragraph reads: "The locality is shown on U. S. Coast & Geodetic Survey charts Nos. 331 and 1206." These charts clearly show the sand bar and show the depth of the water over it. This depth varied from 7 to 11 feet. Paragraph 1 of the instructions to bidders warned them that they must make their own estimates of the "difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies." Plaintiff, therefore, was required to determine whether or not this bar would be an obstruction to navigation.

It is not contended that the chart misrepresented the condition at the time the contract was entered into.

Plaintiff also says that a map attached to the invitation for bids shows a channel in the harbor which extends beyond the jetties and that it indicates that the depth in this channel is 18 feet. This is true, but this map does not show the bar in front of the entrance to the harbor, nor does it purport to show the complete situation. It was correct as far as it went. It did not show the bar in front of the harbor, but plaintiff was expressly referred to a document which did show it.

Under these circumstances, it cannot be said that the defendant misrepresented the conditions at the site.

Furthermore, it is apparent that plaintiff itself did not consider that defendant had misrepresented the conditions at the site, because no complaint of the existence of this bar was made until September 14, 1937, about 18 months after the work had been in progress. This complaint was

made after plaintiff had gotten far behind with its work and after the contracting officer had made complaint about the slow progress being made. If it had thought there had been a misrepresentation of conditions, complaint thereof would have been made long before. It was made merely as an excuse for its tardiness in performing the work and in an effort to relieve itself from the assessment of liquidated damages for its delay.

Plaintiff's claim for an adjustment due to changed conditions also relates to this sand bar, so we shall discuss this claim now before taking up its other claim of misrepresentation of the conditions at the site.

Plaintiff says that a flood in the Merrimack River in the Spring of 1936 greatly decreased the depth over this bar. The Office of the United States Engineer at Boston, Massachusetts, made a survey of the bar and the entrance channel in July 1936, after the flood. This survey showed that there was an available depth of 11 feet at mean low water through the entrance channel, and that the shallowest depth on the range line was 9.5 feet. It is true that the depth at some places over the bar was only 4 feet, as plaintiff says, but so long as there was a channel with a minimum depth of 9.5 feet, the former condition of a minimum depth of 10 feet, as alleged by plaintiff, had not materially changed. Since there was no change in subsurface conditions, plaintiff was not entitled to an equitable adjustment under article 4 of the contract.

Furthermore, this claim of a changed condition was plainly an afterthought, designed to excuse plaintiff for its delay and to relieve it from the assessment of liquidated damages; it was not made until about 18 months after the flood which was alleged to have brought about the changed conditions.

Plaintiff is not entitled to recover damages for misrepresentations as to the existence of this sand bar, nor is it entitled to an equitable adjustment on account of changed conditions in the sand bar.

Plaintiff's other claim of misrepresentation is with respect to the velocity of the average tidal current. The commis-

sioner has found there was no misrepresentation, and we agree. Plaintiff undertook to prove the velocity of the tidal current by the testimony of the masters of tug boats, who estimated its velocity by watching the shore as their boats stemmed the tide. On the contrary, the defendant in November 1936 made a scientific survey to ascertain the velocity, using transits, floats, etc. This survey was conducted by a crew of 11 men over a period of three days and over the full tidal cycle. It showed an average velocity of 2.08 miles per hour. It is much more reliable than the estimates of the velocity of the current made by the masters of these boats. Plaintiff's proof fails to show any misrepresentation in this respect.

Plaintiff's final claim is for the recovery of $5,675.00 deducted as liquidated damages for 227 days' delay at $25.00 a day.

Under plaintiff's contract it was obligated to proceed within 20 days after receipt of notice to proceed and to complete the contract within 365 days after receipt of this notice, January and February excluded. This notice was received on November 7, 1935, which made the date for completion March 5, 1937. However, prior to November 27, 1935, the date plaintiff was required to begin work, and on November 15, 1935, the contracting officer suspended the work on account of bad weather to and including March 31, 1936. The contract was completed on December 22, 1937, 292 days after the original expiration date of March 5, 1937. The contracting officer assessed liquidated damages for the entire 292 days, but the Comptroller General held that the plaintiff was entitled to a credit for 65 days between November 27, 1935, the date the contract required plaintiff to proceed with the work, and April 1, 1936, the date to which commencement of the work was postponed. Accordingly, he authorized the payment to plaintiff of the additional sum of $1,625.00. This was correct.

Plaintiff requested on a number of different occasions extensions of time due to unusually severe weather. These requests for extensions were taken under consideration by the contracting officer who promised to act thereon as soon as

the necessary data could be collected, but no action was taken until after final payment was made. This final payment was accepted by the plaintiff under protest and with the reservation of all of its claims. After final payment the contracting officer notified plaintiff that he had no authority to make any further payment and that the whole matter would have to be referred to the Comptroller General. Finally, however, on December 29, 1938, a little over a year after the contract had been completed, the contracting officer wrote plaintiff denying all its claims, including the one for the remission of liquidated damages. Within thirty days thereafter plaintiff took an appeal to the Secretary of War, but the Assistant Secretary of War on February 2, 1939, wrote plaintiff that further payments could not be made through departmental action, but that the matter had to be referred to the General Accounting Office for direct settlement. Accordingly, he did not act on the appeal.

As we have many times held, the contract placed upon the contracting officer and the Secretary of War the duty of making decisions, and their failure to do so is a breach of contract, which authorizes plaintiff to bring suit in this court to recover the amount to which it is entitled under the contract. The most recent case on this point is *James McHugh Sons, Inc.* v. *United States*, 99 C. Cls. 414, decided May 3, 1943.

However, from a review of the findings of the contracting officer, we are satisfied that he acted correctly in denying plaintiff's request for extensions of time on account of unusually severe weather. His findings of fact, which plaintiff introduced in evidence as its exhibit No. 85, sets out a comparison of weather conditions in each of the years 1897, 1899, 1904, 1905, 1907, 1908, 1911, 1912, 1913, 1914, 1917, and the years 1936 and 1937. The number of days suitable for work in each of the months for each of the years set out in the table in which work was being done on these jetties were obtained from Government inspectors on the jobs. This table shows that from March to December over all the years mentioned above there was an average of 120 days suitable for work. From March to December 1937 there were 107

days suitable for work, and from April to December 1936 there were 132 days suitable for work. In both 1936 and 1937 the average number of days suitable for work was the same as the average number of days suitable for work over all the years listed in the table. It would appear, therefore, that in the years 1936 and 1937 the plaintiff encountered no weather which was not reasonably to be foreseen.

In the specifications plaintiff's attention was called to the fact that "the work is exposed to severe easterly storms," and it was required in bidding on the job to take into account the uncertainty of the weather. The weather not having been more severe than that ordinarily encountered, plaintiff was not entitled to an extension of time on this account. See *United States* v. *Brooks-Callaway*, 318 U. S. 120, and *Caribbean Engineering Co.* v. *United States*, 97 C. Cls. 195, 229.

One further thing ought to be said: The contracting officer, in agreeing to a suspension of work from October 5, 1936, to March 1, 1937, stated if his investigation disclosed that weather conditions were so abnormal and unusual during the period "as compared with what should normally be expected in this season of the year, the matter of extension of contract time will receive our full consideration." While in his findings of fact he made no reference to this particular period in denying an extension on account of unusually severe weather, the table referred to above shows that from October to December 1936 there were 41 days suitable for work, whereas the average number of suitable days in these months in the years listed in the table was only 37. Had the contracting officer given further consideration to this particular period, he would have been justified in denying the extension.

The plaintiff is not entitled to recover, and its petition will be dismissed. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

ARTHUR HUNGERFORD POLLEN (MAUD POLLEN, EXECUTRIX) AND HAROLD ISHERWOOD v. THE UNITED STATES

[No. 43391. Decided October 4, 1943]

On the Proofs

Patents for certain mechanism designed for use in connection with the fire control of guns of large caliber.—It is *held* that the evidence submitted by plaintiffs is insufficient to justify findings as to validity and infringement.

The Reporter's statement of the case:

Mr. Joseph Dugan for plaintiffs. *Mr. John V. Lizars* was on the brief.

Mr. J. F. Mothershead, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant. *Mr. Victor D. Borst* was on the brief.

Plaintiffs brought this suit under the act of June 25, 1910, 36 Stat. 851, as amended by the act of July 1, 1918, 40 Stat. 704, 705, to recover compensation for alleged unauthorized manufacture for, and use by, the United States of devices described in United States patents numbered 1,162,510 and 1,162,511 and issued November 30, 1915, for "Range Clocks," and 1,232,968, issued July 10, 1917, for "Apparatus for determining Sighting Data for Naval Guns." These devices have been designated in the record under the general title of "Range Keepers," and the structures are defined as "certain mechanism designed for use in connection with the fire control of guns of large caliber."

The court having made the foregoing introductory statement, entered special findings of fact as follows:

1. At the time of filing the original petition the plaintiffs, Arthur Hungerford Pollen (now deceased) and Harold Isherwood, were subjects of Great Britain residing, respectively, in London, England, and New York City.

Pollen and Isherwood were jointly granted three letters patent in Great Britain for certain mechanism designed for

use in connection with the fire control of guns of large caliber. Two of these British patents were for military mechanism known as a "Range Clock" and the other for an "Apparatus for determining Sighting Data for Naval Guns." Subsequently, and in accord with Section 4887, Revised Statutes (U. S. C., Title 35, Section 32), Pollen and Isherwood made application for and were issued the following United States patents for the same inventions: 1,162,510 and 1,162,511, issued November 30, 1915, and 1,232,968 issued July 10, 1917.

2. August 1, 1936, Pollen and Isherwood filed their original petition in this court alleging that under the act of June 25, 1910 (36 Stat. 851), as amended by the act of July 1, 1918 (40 Stat. 705), they were entitled to a judgment against the United States for $3,000,000 by reason of infringement of their patent rights as covered by the above-enumerated United States patents, copies of which, plaintiffs' exhibits J, K, and L, are made a part of this finding by reference.

The petition set forth that the alleged infringement was the manufacture and use of what are known as the Ford Range Keeper, Mark I, the Ford Range Keeper, Mark II, and other devices not known by plaintiffs.

September 9, 1936, defendant joined issue by filing a general traverse, and on October 5, 1936, the case was referred to a commissioner of the court for the purpose of taking testimony and reporting the facts to the court.

3. A range clock or a range keeper is a calculating mechanism used on a naval vessel in connection with gun-fire control. This calculating mechanism is supplied with certain data, including the ship's speed and the bearing of the target, the course and speed of the target, and the range and bearing of the target. The machine then integrates the numerous factors supplied to it and, in turn, supplies simplified data for training and elevating the guns so that the shots will hit the target, irrespective of the relative movements and courses of the ships.

Such a device is a vital part of the fire-control system of a warship in obtaining accuracy of fire, and it has been the custom of the Navy Department, even in times of peace, to keep the details of such mechanisms secret, not only subse-

quent to their installation on a ship but also during their manufacture.

4. It has been the policy of the Navy Department to revise from time to time its secret and confidential list and to release therefrom instruments and material which in time become well known and which it is no longer necessary to keep in secrecy status.

5. October 28, 1936, plaintiffs filed a motion under Section 164 of the Judicial Code (U. S. Code, Title 28, section 272) for a call on the Navy Department.

This motion for call, so far as pertinent, is as follows:

> 1. That "the so-called Ford Range Keeper, Mark I, Ford Range Keeper, Mark II, * * *" as well as any and all other makes and models of Range Keepers now or heretofore utilized by the Navy Department of the said defendant are necessary and relevant to the material issues of the above-entitled cause.
>
> 2. That specimens of said devices utilized by the defendant are not accessible to your petitioners.
>
> 3. That your petitioners should have access to specimens of the said Range Keepers to prove the issues set forth in the above-entitled cause of action.
>
> Wherefore, your Petitioners pray that the said Navy Department of the United States be ordered to produce and deliver to this Honorable Court, for the examination of your petitioners, one specimen of all modifications of the following Range Keepers:
>
> 1. Ford Range Keeper, Mark I.
> 2. Ford Range Keeper, Mark II.
> 3. Ford Range Keeper (All other Marks).

6. November 6, 1936, defendant filed objections to allowance of plaintiffs' call. Defendant's objections were that the subject matter of plaintiffs' patent claims pertained to National Defense and that to furnish such information would be injurious to the public interest. The Secretary of the Navy, it was alleged, had so advised the defendant and requested opposition to allowance of the call.

November 17, 1936, the court made the following order and indorsed the same upon plaintiffs' motion for a call upon the Navy Department:

> Items 1 and 2 of within motion are overruled. The parties to this litigation are granted permission to make

physical and personal inspection of the exhibits called for and such photographs as are considered essential, the inspection to take place in the presence of all parties interested and the commissioner of this court to whom the case has been referred. Item 3 is overruled.

7. Plaintiffs' attorneys appeared at the Navy Department and, in pursuance of said court order, requested permission to inspect the devices used by the Navy which they believed came within the terms of the court order. The Navy Department refused to permit inspection of any of the devices mentioned upon the ground that the information sought was of a strictly confidential nature involving the National Defense and that disclosure of the mechanisms to the public would be contrary to public policy.

8. June 6, 1937, the Secretary of the Navy issued the following order:

To All Whom It May Concern:

Notice is hereby given that all information concerning the details of range keepers in use by the Navy Department, past and present, come within the provisions of the acts of Congress as defined in 50 U. S. Code. Such information relates to the National Defense, and its disclosure will be injurious to the public interest of the United States.

(Signed) CLAUDE A. SWANSON,
Secretary of the Navy.

9. June 7, 1937, a hearing was held on behalf of plaintiffs in New York City. The two principal witnesses were Commander Robert A. Lavender, of the Navy, and Charles R. Infante, a former employee of the Ford Instrument Company, which company, under contract with the Navy Department, had manufactured and delivered to the Navy the devices alleged by plaintiffs to infringe their patents.

Defendant's attorneys objected to all interrogatories having to do with the disclosure of any range keepers used by the Navy and gave advance notice that objections would be made to any and all testimony of this character on the ground that the Navy considered such information secret and to make it public would be prejudicial to the National Defense. Each witness declined to answer any propounded question having to do with such a disclosure.

The Commissioner sustained defendant's objections, whereupon plaintiffs' attorney then moved that the hearing proceed *in camera*. The Commissioner's ruling was as follows:

> There are two things before me. There is your motion to instruct the defendants to proceed with the case in camera and Mr. Borst's objection to the question as calling for confidential Navy information. As to your motion to direct the defendant to proceed in camera, insofar as that is properly directed to me as a Commissioner, and not to the Court, I will deny that motion with an exception to you, so that you may raise the question directly before the court.
>
> As to Mr. Borst's objection to the testimony of the witness, calling for confidential information, I will sustain that objection for the same reason. That is, in passing on these two questions I make no attempt to decide them on the merits, but simply feel that the matter is of such importance that the Commissioner should not pass on it but should refer it to the full Bench; and you have your record and you are in a position to go before the Court with a motion to renew your motion before the Court.

10. July 2, 1937, plaintiffs filed a motion asking the court to order the Commissioner to permit plaintiffs to introduce before him the testimony sought to be elicited from the above witnesses, the plaintiffs offering to stipulate that the entire hearing and all the proceedings in the case be conducted *in camera*. The court overruled plaintiffs' motion. 85 C. Cls. 673.

11. In 1939 the plaintiff Pollen died. Thereafter plaintiffs by motion suggested to the court the death of Pollen and requested that the requirement of Rule 17 respecting substitution of personal representative of deceased be waived pending completion of the taking of testimony. That motion was granted by the court August 1, 1939.

August 1, 1939, plaintiffs filed their amended petition, designating Arthur Hungerford Pollen (Maud Pollen, Executrix) and Harold Isherwood as petitioners, but no proof has been adduced of the legal capacity of Maud Pollen to maintain the suit.

Harold Isherwood survives and remains a subject of Great Britain and a resident of New York, New York.

12. The fact that the Ford Instrument Company manufactured and supplied to the United States Navy Department Ford Range Keepers, Mark I and Mark II, was a matter of public knowledge in 1920. In this year the Bureau of Ordnance of the Navy Department issued a publication entitled "Navy Ordnance Activities, World War 1917–1918." This book was printed at the Government Printing Office and was available at the New York Public Library.

On page 159 of this publication it is stated with reference to the Ford Instrument Company, that—

> The company produced the following instruments, which were accepted and ordered by the United States Navy Department:
> 1. Ford range keeper, Mk. I.
> 2. Ford range keeper, Mk. II.
>
> * * * * *

On page 152 of this publication there is a table showing that 946 Ford range keepers, Marks I and II, were ordered or delivered up to November 11, 1918. This publication does not disclose any of the constructional details of these devices.

A copy of this publication, plaintiffs' exhibit Q, is made a part of this finding by reference.

13. Hannibal C. Ford, the president of the Ford Instrument Company, filed three applications for United States patents as follows, upon which patents were issued on the dates indicated:

> Patent 1,450,585 issued April 3, 1923, on application filed June 19, 1918, Serial No. 240,883;
> Patent 1,484,823 issued February 26, 1924, on application filed February 24, 1921, Serial No. 447,452;
> Patent 1,827,812 issued October 20, 1931, on application filed March 1, 1919, Serial No. 280,150.

These patents all relate to range keepers or range clocks, and the disclosure of the structure and mechanism of the devices upon which these patents are predicated is in sufficient detail and sufficiently clear to enable those skilled in

this particular art to construct the devices and to practice the inventions covered by the patents.

On the respective dates of issue of the patents as given above, these disclosures of mechanism and other statements made in the specifications by the inventor became matters of knowledge available to the general public.

With respect to the Mark I Range Keeper, the following statement appears on page 1 of the specification of Ford patent 1,484,823:

> Instruments having the general structural details of that shown in the patent referred to above have been used in connection with range keepers of the type shown in my copending application, Serial No. 280,150, filed March 1, 1919, and which are particularly intended for use with guns of large calibre, such apparatus being known in the United States Navy as Mark I range keeper. In attempting to apply the instruments to range keepers of the type shown in my Patent No. 1,370,204 granted March 1, 1921, which is particularly intended for use in connection with small calibre guns, difficulty was experienced on account of the space occupied by the gear sectors and other associated parts of the mechanism.

This statement has reference to Ford patent 1,827,812 listed above as identified by the application number.

Copies of the three Ford patents, plaintiffs' exhibits N, O, and P, are made a part of this finding by reference.

14. There is no evidence as to what range-keeper devices were either manufactured for or used by the United States within the period beginning August 1, 1930 (six years prior to filing of the original petition), and terminating on July 10, 1934 (the expiration date of the latest patent in suit), and no findings on infringement or validity can therefore be made.

15. The defendant presented no evidence either as to manufacture or nonmanufacture, use or nonuse, of devices coming within the terminology of the claims of the patents in suit.

The court decided that the plaintiffs were not entitled to recover, in an opinion *per curiam* as follows:

The evidence submitted by plaintiffs is not sufficient to show what range-keeper devices were either manufactured

for or used by the United States within the period beginning six years prior to filing of the original petition and July 10, 1934, the expiration date of the latest patent in suit (findings 12 and 14), and no findings on validity or infringement can be made. The petition must, therefore, be dismissed. It is so ordered.

R. C. HUFFMAN CONSTRUCTION CO. v. THE UNITED STATES

[No. 43478. Decided October 4, 1943]

On the Proofs

Government contract; notice to bidder to investigate conditions; no misrepresentation of conditions by defendant.—Where Invitation for Bids and Specifications put contractor on notice to investigate the conditions existing in the river bed to be dredged, and where defendant gave plaintiff such information as it had, there was no misrepresentation of conditions by the defendant.

Same; equitable adjustment, right to.—It is a prerequisite to plaintiff's right to an equitable adjustment under Article 4 of standard Government contract that it appear that conditions at the site were materially different from those shown on the drawings or indicated in the specifications.

Same; finding of contracting officer as to actual conditions conclusive if not arbitrary or grossly erroneous.—In determining whether or not conditions at site of work were different from those shown on the drawings or indicated by the specifications, the findings of fact of the contracting officer as to the conditions actually encountered are final and conclusive if not arbitrary or grossly erroneous.

Same; equitable adjustment; conditions encountered differing from those shown on drawings or specifications.—Where specifications stated materials to be removed were believed to be sand and clay "with some hardpan and boulders" and where the hardpan actually removed was 11 percent of the total materials removed, conditions actually encountered did not materially differ from those indicated by the specifications; on the other hand, if the hardpan actually removed had been as much as that claimed by plaintiff, to wit, 50 percent, the conditions actually encountered would have materially differed from those indicated by the specifications.

Same; Government contract; finality of findings of contracting officer on character of materials removed.—Where specifications provided for payment of cost of removing shoals occurring after previous dredging, but provided for the removal of misplaced materials

at the expense of the contractor, and the contracting officer found that the materials removed were materials misplaced, and not shoals, his decision is final and conclusive, unless arbitrary or grossly erroneous.

Same; remission of liquidated damages, decision of contracting officer conclusive.—Contracting officer's decision on contractor's claim for remission of liquidated damages for delay, which decision was affirmed by the head of the department, was conclusive in the absence of proof that such decision was arbitrary or erroneous.

Same; National Industrial Recovery Administration Act, increased costs; increased labor costs in response to pressure.—Where contract was exempt from the provisions of the National Industrial Recovery Administration Act and the President's Reemployment Agreement and Code of Fair Competition, but in response to pressure brought to bear on contractor to increase wages and shorten hours as prescribed in the President's Reemployment Agreement, contractor did increase wages and shorten hours; it is *held* that such increase of wages and shortening of hours were the direct result of the enactment of the National Industrial Recovery Administration Act and plaintiff is entitled to recover under the provisions of the Act of 1934 (U. S. Code, Title 41, Section 28).

The Reporter's statement of the case:

Mr. Herman J. Galloway for the plaintiff. *Mr. Harry D. Ruddiman* and *King & King* were on the briefs.

Mr. Saul R. Gamer, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. J. H. Reddy* was on the brief.

The court made special findings of fact as follows:

1. Plaintiff is an Ohio corporation with its principal office in Buffalo, New York. It is and during the pertinent times hereinafter mentioned was engaged in the dredging business.

2. In 1932 the defendant was considering issuing invitations for bids for dredging operations in Monroe Harbor, Michigan, and issued a "Preliminary Notice of Invitation for Bids for Dredging in Monroe Harbor, Michigan," dated October 31, 1932. That notice contained the following statements:

> This office expects to invite proposals prior to the opening of the 1933 working season for the dredging of approximately 3,800,000 cubic yards of material at

Monroe Harbor, Michigan—the work to commence on or before the beginning of the season and to be completed by December 1, 1933. In order that prospective bidders may have an opportunity to examine the area of the proposed work before the close of the present season, the following information relative thereto is given.

* * * * *

The material to be removed is believed to be sand, clay, and boulders. However, the price bid per cubic yard for dredging will include the cost of removing all materials encountered, including snags, stumps, trees, underbrush, piling, revetment, stone-filled cribs, and the concrete sub-structure of the Monroe Light. The removal of ledge rock, if encountered, will not be required. Probings made by this office indicate that ledge rock will be encountered, if at all, only at the extreme upper end of the proposed work.

* * * * *

Copies of a preliminary location map showing the general features of the proposed work are available in this office and may be obtained, without charge, on request.

The information and data given in this notice are preliminary and tentative only, and are subject to change without notice. More detailed information will be issued at the time of invitation for bids.

The area described included not only the area covered by the suit involved in this proceeding but also an adjoining area, the areas being referred to in the specifications later issued as Sections B and A, respectively. Copies of the notice were sent to plaintiff and to other interested prospective bidders.

3. Shortly after the receipt of the preliminary notice referred to in the preceding finding, namely, in the early part of November 1932, plaintiff sent two of its employees to the site of the proposed work for the purpose of making an investigation incident to the submission of a bid. While these employees were not graduate engineers, they were experienced in dredging operations. One of them, E. D. Rowan, had been engaged in heavy construction work about thirty years and had been employed by plaintiff since 1928, during which time he had made approximately a dozen

examinations for dredging operations. However, he had never done any work in this area, was generally unfamiliar with the area, and was unacquainted with material known as hardpan. The other employee was a dragline operator. These two employees together with some laborers spent four days examining the site of the work, during which time they examined the area to be dredged by probing it with an iron pipe and, in addition, by boring test holes on the river banks with an auger. The test holes were approximately 500 feet apart; about 24 or 25 were bored. The auger would penetrate all material in the area including hardpan, except ledge rock and boulders, and would indicate whether the material through which it was passing was hard or soft. The materials brought up in the auger boring were pulverized and saturated with water. Samples of the material brought up by the auger borings, notes on the probings, and other information were furnished by Rowan to plaintiff's officers. The use of an auger and the probing method employed by plaintiff's employees are means often used by contractors in the examination of areas to be dredged. With both the probing pipe and the auger, information was gained as to the relative hardness of materials penetrated and that the material became harder as the depth increased, though the exact type of material was not necessarily revealed by these methods.

4. January 3, 1933, the defendant issued an invitation for bids for "furnishing all labor and materials and performing all work for dredging approximately 3,812,000 cubic yards, place measure, of material, consisting of sand, clay and boulders, from Monroe Harbor, Michigan," the bids to be opened January 20, 1933. The estimated quantity applicable to Section B, the section here involved, including allowable overdepth, was approximately 1,512,000 cubic yards. The notice of invitation for bids stated that—

> An index map marked "Monroe Harbor, Mich.; Proposed Dredging; 21-foot Project; To accompany specifications dated January 3, 1933"; In one sheet; File No. D. Mon. 10/59, showing the location of the work, is attached hereto.
>
> Other maps marked "Monroe Harbor, Mich.; Survey of Nov. 8–22, 1929 and June 25, 1932; In 9 sheets; File

No. D.Mon. 10/44–52" showing the location and the latest soundings and probings made on the various areas and other available data may be seen at this office and should be consulted by intending bidders before submitting their bids.

5. Attached to and made a part of the invitation for bids were the specifications which were subsequently made a part of the contract. The specifications contained the following provisions:

* * * * *

2. *Work to be done.*—The work provided for herein is authorized by the act of July 3, 1930, as modified by the act of July 14, 1932. It consists in furnishing all plant, labor and supplies, and dredging and disposing of all material encountered in order to secure the following improvements:

* * * * *

SECTION B:

(a) A swept depth of 21 feet below low water datum over a channel width of 200 feet, extending upstream from a line bisecting the angle at the upper end of the U. S. Canal, a distance of about 4,460 feet along the center line of the Monroe Canal, with a triangular widening area on the inside of each of the two angles, as shown on the maps listed in paragraph 6.

(b) A swept depth of 18 feet below low water datum (see paragraph 8), over a turning basin area of about 22 acres, of the dimensions and in the location shown on the maps listed in paragraph 6.

3. *Commencement, prosecution, and completion.*—The contractor will be required to commence work under the contract within 30 calendar days after the date of receipt by him of notice to proceed, to prosecute the said work with faithfulness and energy, and to complete it on or before December 1, 1933; provided, that should the total quantity of material to be paid for actually removed from either section under the contract exceed the quantity on which bids for such section will be canvassed as stated in paragraph 12 of these specifications, additional time for completion of that section will be allowed at the rate of 1 calendar day for each 5,000 cubic yards in excess of such estimated quantity.

In case of failure on the part of the contractor to complete the work within the time thus determined and agreed upon for its completion, the contractor shall

pay to the Government as liquidated damages the sum of $200 for each uncompleted section for each calendar day of delay until the work in such section is completed and accepted.

No work will be required during the period between December 15th and April 1st, inclusive. If he so desires, the contractor may work during any part or all of this period upon giving written notice of his desire to the contracting officer; but whether he works or not, no part of the period above named will be considered in computing the time allowed for completion, or in computing liquidated damages.

* * * * *

13. *Character of materials.*—The materials to be removed are believed to be sand and clay, with some hardpan and boulders, and, in addition: revetment, foundation piling, underbrush, stumps, snags, trees, etc., along the banks of the United States and Monroe Canals; piling, stone-filled cribs, etc., within the contract area; the concrete foundation of Monroe Light; refuse from the Monroe paper mills; and possibly buildings or portions thereof not removed by the owners from within the limits of the proposed work.

Bidders are expected to examine the work and decide for themselves as to its character and to make their bids accordingly. In the event that materials, structures, or obstacles of a materially different character are encountered during the progress of the work, and the cost of their removal or satisfactory treatment obviously would be, in the opinion of the contracting officer, either in excess of, or less than the unit price bid by the contractor, the contracting officer, in either alternative, will then proceed in accordance with the provisions of article 4 of standard Government Form No. 23, or any authorized revision thereof.

14. *Work covered by price bid.*—The price bid per cubic yard for dredging shall cover the cost of removal and disposal of all material and obstructions (see paragraphs 9 and 13) encountered except ledge rock. The removal of ledge rock will not be required. Material to be classified as ledge rock must be natural rock in place of such size and composition as in the opinion of the contracting officer shall require special plant for its removal, and shall not include fragments of rock or boulders capable of being removed by the dredge in one piece. Should ledge rock be encountered, the contractor shall remove therefrom all overlying material which in the

judgment of the contracting officer can be removed by the use of the plant specified in the accepted bid, or its equivalent. Nothing in this paragraph shall be construed as prohibiting the removal of excepted material by special means at prices agreed upon and approved in accordance with article 4 of the contract.

* * * * *

26. *Plant.*—The contractor agrees to place on the job sufficient plant of size suitable to meet the requirements of the work. Plant shall be kept at all times in condition for efficient work, and subject to the inspection of the contracting officer. It is understood that award of this contract shall not be construed as a guaranty by the United States that plant listed in statement of contractor for use on this contract is adequate for the performance of the work.

* * * * *

No reduction in the capacity of the plant employed on the work shall be made except by written permission of the contracting officer. The measure of the "capacity of the plant" shall be its actual performance on the work to which these specifications apply.

27. *Claims and protests.*—If the contractor considers any work required of him to be outside the requirements of the contract, or considers any record or ruling of the inspectors or contracting officer as unfair, he shall ask for written instructions or decision immediately and then file a written protest with the contracting officer against the same within 10 days thereafter, or be considered as having accepted the record or ruling. (See arts. 3 and 15 of the contract.)

6. In January 1933 after the invitation for bids and specifications of the work had been issued, but prior to the filing of its bid, two of plaintiff's representatives made a further examination of the site to be dredged. One of these (Rowan) had participated in the previous investigation and the other (MacKenzie) was a man experienced in dredging operations who had investigated many dredging operations prior to this time. However, the latter had never made an investigation in this area, and relied on the defendant's specifications and drawings and information furnished by Rowan in fixing a bid price. Due to the fact that at that time the river was covered with drift ice and the ground was frozen, no probings or soundings were carried out and no test pits were dug.

Rowan had with him the specifications which had been issued by the defendant and certain maps. In addition to looking over the site, MacKenzie and Rowan discussed soil conditions with local laborers and boatmen, and Rowan reported to MacKenzie the results of his previous investigation. On the basis of the information thus obtained, MacKenzie determined a bid price for the dredging of Section B of 11 cents per cubic yard.

One of the maps made available to plaintiff and other bidders and which Rowan examined prior to the filing of plaintiff's bid contained the following information regarding probings that had been made by the defendant:

Data on probing

No.	Depths		Penetration	Hammer		No. of blows	Remarks
	Earth	Rock		Weight	Drop		
1	8. 3′	18. 9′	10. 6′	100#	6. 0′	72	5′ in first ten blows.
2	8. 1	18. 1	10. 0	100	5. 0	100	4′ soft.
3	9. 4	18. 2	8. 8	100	5. 0	135	4′ soft.
4	12. 0	18. 9	6. 9	100	5. 0	127	Hard all the way.
5	10. 8	19. 7	8. 9	100	5. 0	175	" " " "
6	12. 8	21. 85	9. 05	100	5. 0	125	" " " "
7	11. 8	21. 0	9. 2	100	5. 0	210	" " " "
8	13. 1	22. 15	9. 05	100	5. 0	225	" " " "
9	11. 6	22. 1	10. 5	100	5. 0	150	" " " "
10	14. 6	24. 05	9. 45	100	5. 0	200	" " " "
11	14. 1	24. 45	10. 35	100	5. 0	175	" " " "
12	11. 2	22. 25	11. 05	100	5. 0	190	" " " "
13	11. 0	21. 85	10. 85	100	5. 0	185	" " " "
14	9. 8	21. 95	12. 15	100	5. 0	163	3′ soft.
15	9. 5	18. 35	8. 85	100	5. 0	250	Hard all the way; rock in doubt.
16	10. 0	25. 0+	15. 0				Not down to rock.
17	6. 8	18. 5?	11. 7				Rock in doubt.
18	10. 1	20. 3?	10. 2	The River Raisin having frozen over, the probing was continued on the ice by churning a ½″ pipe fitted with a steel point to rock or grade.			Rock in doubt.
19	-------	20. 8?	-------				Not down to rock.
20	2. 8	23. 8+	21. 0				" " " "
21	2. 7	21. 3+	18. 6				" " " "
22	2. 2	22. 5+	20. 3				No rock.
23	8. 0	23. 8+	15. 8				6′ soft.
24	8. 3	23. 3+	15. 0				6′ "
25	8. 2	23. 1+	15. 0				6′ "

The probings referred to above were made with an iron rod for the purpose of determining whether ledge rock existed above the project depth, and no deductions were made therefrom by defendant's representatives in preparing the specifications as to the existence of hardpan, though such probings did furnish information which would indicate the existence of hard materials in certain of the areas probed.

7. On the basis of the information set out above, plaintiff on or about January 17, 1933, submitted a bid of 11 cents per cubic yard for dredging Section B, and when the bids were opened on January 20, 1933, it was found that plaintiff was the low bidder. In its bid plaintiff gave the following description of equipment which would be used on the work:

Name	Kind	Capacity	Condition
Dredge *Christobal*	Hydraulic	16″	Good.
" *Dudley*	"	10	"
" #3	"	16	"
" *Broward*	"	16	"
Also necessary Tugs, Scows, etc.			

When defendant's contracting officer noticed that plaintiff proposed in its bid to use only hydraulic dredges, he immediately conferred with a representative of the plaintiff regarding its ability to provide a dipper dredge to take care of some of the work which he said would require a dredge of that character. January 21, 1933, the contracting officer wrote plaintiff in regard to the use of a dipper dredge, in which letter he made the following statements:

> In our opinion, there are classes of material to be encountered in the area which a hydraulic dredge of ordinary design may not be able to remove, and it is believed that a contractor undertaking the work should be prepared to handle this material with a dipper dredge.
>
> *   *   *   *   *
>
> As the final decision on the award of the contract for this work cannot be made until the above advice is received, it is requested that you favor us with a reply at the earliest practicable date.

January 24, 1933, plaintiff advised defendant's contracting officer in part as follows:

> We note carefully what you say regarding an adequate dipper dredge. It had not been our intention to bring a dipper dredge to the work at the beginning. However, our Dipper Dredge *T. E. Greer*, which is now located in the Marseilles Pool, Illinois, will be available on or about April 1st. This Dipper Dredge is a very efficient machine, manufactured by the Marion

Steam Shovel Company, and has a capacity of 4½ cubic yards. The Dredge was rebuilt last spring at a cost of some $28,000.00 for the purpose of digging ledge rock in the Marseilles Pool. This rock was not encountered, however, and this Dipper Dredge has been digging earth most of the time. As we are putting other equipment into the Pool, this Dipper Dredge will be available as above stated, about April 1st.

8. At or about the time the bids were received and opened but prior to the execution of the contract, the defendant prepared an engineering cost estimate of the work to be performed under the contract which showed an estimated yardage to be removed of 1,567,000 cubic yards, of which it was estimated 100,000 cubic yards would be removed by dipper dredge and 1,467,000 by hydraulic dredge. The bids on the contract ranged from plaintiff's bid of 11 cents to 25 cents per cubic yard and the average of all bids was 17.41 cents per cubic yard. The next lowest bid was 12 cents per cubic yard. Plaintiff's bid, plus the cost to the Government of supervising plaintiff's work, was $24,379 less than what the Government had estimated it would cost it to do the work.

In preparing its estimate of dipper dredge work, the defendant did not take into consideration any amount of hardpan but did consider that rocks from stone-filled cribs and boulders might interfere with the operation of a hydraulic dredge and could be removed with a dipper dredge. The reference in the specifications (which accompanied the invitation for bids) to hardpan was made without definite information whether some or no hardpan might be encountered, the words "some hardpan" being inserted as precautionary information based upon investigations and surveys theretofore made. The failure to include similar precautionary information in the preliminary notice of invitation for bids was an oversight on the part of the defendant.

The results of these investigations and surveys, insofar as material, were made available to plaintiff and other bidders and there was no misrepresentation on the part of the defendant or withholding of information in the possession of the defendant.

9. February 13, 1933, plaintiff and defendant entered into a contract under which plaintiff agreed to "furnish all labor and materials, and perform all work required for dredging Section B, Monroe Harbor, Michigan, as described in paragraph 2 of the specifications hereinafter referred to [see finding 5], for the consideration of eleven (11) cents per cubic yard, place measurement, in strict accordance with the specifications, schedules, and drawings, all of which are made a part" of the contract. The work was to be commenced within thirty days after date of receipt of notice to proceed and was to be completed on or before December 1, 1933. The contract contained the following provisions:

> Article 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract, and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.
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> Article 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or)

specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract.

ARTICLE 5. *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

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ARTICLE 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: *Provided further*, That the contractor shall within ten days from the be-

ginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

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ARTICLE 15. *Disputes*.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

In general the work to be done consisted of the dredging of a channel to a depth of 21 feet below low water datum and for a width of 200 feet, the length of the channel being approximately 4,460 feet, and the dredging of a turning basin immediately adjacent thereto of about 22 acres to a depth of 18 feet below low water datum. The channel and basin were in the Raisin River and extended from near the town of Monroe, Michigan, downstream toward Lake Erie. This area was referred to as Section B. As a part of the same project or program, defendant let a contract at or about the same time to others for dredging a channel 21 feet deep and 200 feet wide extending from the downstream end of plaintiff's work some distance, then a channel 21 feet deep and 300 feet wide extending out into Lake Erie, that area being referred to as Section A. In all of the depths mentioned, there was an allowable overdepth of two feet for which defendant agreed to pay in the event the material was removed in the processes of dredging.

Plaintiff was notified to proceed with the contract on February 27, 1933.

10. In carrying out the dredging operations, plaintiff encountered mud and muck, silt, sand, clay, gravel, hardpan,

stone, boulders, and miscellaneous debris in varying proportions. The existence of all these materials was either mentioned in the specifications or reasonably suggested or described from the plans, specifications, and drawings which were made available for plaintiff prior to the execution of the contract. However, the relative quantities of each were not indicated. One of the materials encountered in quantities larger than expected by plaintiff was hardpan. Neither plaintiff nor defendant knew definitely of the existence of hardpan and neither one figured on it. This material is of glacial formation. It is composed of clay, sand, and gravel, or clay and sand, or clay and gravel, or clay alone, which has been cemented together through the operation of physical and chemical processes. Its hardness varies because of its composition and the manner in which it is formed but in most instances it is difficult to excavate effectively with a spade. Cemented gravel is a type of hardpan which is sometimes referred to as gravel hardpan. The principal types of hardpan found on this job were of clay mixed with sand and gravel, which was found largely in the channel, and of cemented gravel, which was found largely in the turning basin, and they were found at various places over the respective areas and at varying depths from approximately 2 feet below datum to approximately 19 feet below datum. In general the hardness increased as it was found at greater depths. The harder portions of this material on this job could not be effectively excavated with a spade and a heavy stroke of a pick would not penetrate it more than one to three inches.

11. Plaintiff began its dredging operation with the hydraulic Dredge *Dudley* which was the smallest dredge of the character it used on the job, having a 10″ discharge pipe, a 50-horsepower motor on the cutter and a 180-horsepower motor on the pump. Shortly after beginning operations it was found that this dredge was encountering hardpan which it was unable to remove and which caused damage to the dredge when encountered. While this dredge was on the job from April 26, 1933, to May 1, 1934, and during that period dredged 374,303 cubic yards of material, it was generally unsuccessful in dredging hardpan, only one percent of

the material dredged by it being classified by the defendant as hardpan, by a method hereinafter mentioned, and at no time, with the possible exception of a short period in February 1934, was it able to grade to the project depth.

Hydraulic Dredge *No. 3* began work May 25, 1933, and continued on the job from that date to March 28, 1935, except for the periods between June 20 and October 1, 1934, and January 31 to March 11, 1935. It had a 16″ discharge pipe, a 100-horsepower motor on the cutter and a 360-horsepower motor on the pump. It likewise had difficulty in removing the hardpan encountered, though of the 550,064 cubic yards of material dredged by it, 16 percent was classified by defendant's representatives as hardpan. While it was unable to grade to the project depth in much of its work, it did reach the project depth in a part of its work.

The third dredge brought on the job by plaintiff was the hydraulic Dredge *Christobal* which was somewhat more powerful than Dredge *No. 3*, having a 16″ discharge pipe, a 150-horsepower motor on the cutter and a 750-horsepower motor on the pump, and during its period of operation from August 10, 1933, to May 1, 1934, dredged 495,710 cubic yards. Only 5 percent of the material dredged by it was classified by defendant as hardpan. It likewise had difficulty in dredging to project depth though the required depth was reached in a part of its work.

12. While plaintiff was operating with the three hydraulic dredges just mentioned, it brought the dipper Dredge *Capitol* to the job on October 6, 1933, and it remained on the job until February 28, 1934, during which period it dredged 44,983 cubic yards. It had a capacity of 3½ cubic yards, which was somewhat less than the capacity of the dipper Dredge *Greer* referred to in plaintiff's letter of January 24, 1933 (see finding 7), as a dredge owned by plaintiff at that time and which would be available for the work about April 1, 1933. Its engine, however, was larger than that of the *Greer* and generally it was at least equal to the *Greer* in its ability to dig hard material. Defendant's representatives classified 58 percent of the material removed by this dredge as hardpan. The material removed by it was disposed of by overcasting into the channel alongside the

dredge and later removed by some other equipment to the appropriate dumping area. Its difficulty with the hardpan encountered was somewhat similar to that encountered by the hydraulic dredges just mentioned. Because of the inability of this dredge to show satisfactory production, the extent of damage to it on account of the material encountered and the resulting high cost of production being shown, it was laid up February 28, 1934, and not thereafter used on the job.

On November 29, 1933, and January 26, 1934, respectively, plaintiff also brought onto the job its *No. 14* Dragline which had a capacity of 2½ cubic yards and its *No. 24* Dragline which had a capacity of 4 cubic yards. This equipment operated from the banks by casting a bucket forward and dragging it towards the machine thus filling the bucket, after which the bucket was raised and the boom swung around depositing the material somewhere within the reach of the boom. The *No. 14* Dragline removed 36,493 cubic yards and the *No. 24* Dragline 69,988 cubic yards, 33 percent of the former being classified by the defendant as hardpan and 21.6 percent of the latter. Because of the width of the channel, this equipment could not remove the material in the center, and because of the hardness of the material encountered, it was unable to dredge to grade in many instances.

A further hydraulic dredge used by plaintiff was the *Peru*, which was one of the most powerful hydraulic dredges on the Great Lakes, having a discharge pipe of 22″, a motor of 450 horsepower on the cutter, and 2,000 horsepower on the pump. This dredge was owned by the Gahagan Construction Company, and it was secured by plaintiff because of dissatisfaction of the defendant with the progress which was being made, and the suggestion by defendant's representatives that the lack of satisfactory progress was due to the insufficient capacity and power of the dredges being used. The production, however, which it was able to make during the short period it was on the job was so small—15,800 cubic yards for the period from September 9 to September 30, 1934, as compared with its rated capacity which was 450 cubic yards per hour on ordinary sand and clay—

that plaintiff found it uneconomical to continue it in operation any longer. Of the material excavated by it, 95 percent was classified by defendant's representatives as hardpan. It operated over areas which had previously been covered by other dredges, but which had failed to reach contract depth, and this in part accounted for its low production.

Plaintiff completed the operation by subletting the amount remaining to be done at that time to the Great Lakes Dredging Company, which owned and placed in operation on the job the dipper Dredge *Mogul*, one of the most powerful dipper dredges on the Great Lakes, and with a bucket capacity of 12 cubic yards. It was on the job from March 19 to March 31, 1935, during which period it dredged 50,250 cubic yards. Under its subcontract for this work plaintiff paid 65 cents per cubic yard. Of the material dredged, defendant classified 10 percent as hardpan. Both Dredges *Peru* and *Mogul* excavated to contract depth.

13. The character of the material encountered, in particular the hardpan, caused serious damage to plaintiff's equipment, breaking cutters on the dredges, pumps, shafts, and other parts. Teeth on the cutters were frequently broken. In an effort to excavate the hard material, plaintiff had special cutters with manganese teeth installed on the dredges, but the material was so hard the teeth were worn out in a few days.

14. During the course of the operations, daily reports were kept by both plaintiff and defendant on which notations were made by their respective representatives, including notations as to the character of material encountered each day by each dredge, and the total material dredged each day. No effort, however, was made to indicate on these reports the relative proportions or percentages of materials encountered and no classification of materials was required since plaintiff's bid was a fixed price of 11 cents per cubic yard for all material to be excavated. Defendant's representatives, however, prepared monthly reports in which they undertook to show various matters pertaining to the operation, including percentages of the various classes of material being excavated by the several dredges.

The information for these classifications was obtained from information contained in their daily reports, from frequent inspections of the dumping grounds where the material was being deposited, and from notes made from time to time during the daily operations. This method of classification was subject to inaccuracies for the reason that the material deposited on the dumping grounds had been churned and broken in its removal by the dredges and it was therefore not possible to determine with absolute accuracy the exact nature of the material before it was dredged. On the basis of the reports prepared in that manner, the defendant determined that the total of 1,592,608 cubic yards of pay materials excavated, including allowable overdepth, consisted of the following:

	Cubic yards	*Per cent*
Sand	366,300	23
Clay	318,522	20
Gravel	286,670	18
Mud	175,187	11
Hardpan	175,186	11
Silt	159,261	10
Stone	95,556	6
Miscellaneous	15,926	1

15. In May 1935, after the job had been completed on April 1, 1935, plaintiff had various test pits dug along the banks of the channel but opposite the area dredged. In some places these pits were 500 or 600 feet apart. One pit which was begun on May 7 and completed on May 17, 1935, was dug for the entire project depth plus an overdepth of two feet, and that pit revealed black clay for the first 2.8 feet from the datum line, mottled hardpan for the next 6.5 feet, blue hardpan for 4.3 feet, boulders 1.3 feet, blue hardpan 2.6 feet, and light blue shale for 5.5 feet. In addition certain other test pits were dug along the banks of the channel to points where hardpan was encountered but these pits were not dug below the points where hardpan was encountered. With these test pits as a basis and also using such data as appeared on the daily reports showing where hardpan was encountered, plaintiff had theoretical computations prepared purporting to show that of the 1,592,608 cubic yards of pay material dredged, 404,513 cubic

yards were clay hardpan, 310,228 cubic yards cemented gravel or gravel hardpan, and 28,315 cubic yards were shale ledge rock.

These computations were subject to possible inaccuracies because of various factors, including the location of test pits and their small number, variations in the relative hardness of the materials classified as hardpan, and the fact that the area had already been dredged at the time the computations were made, which made it impossible to have a comparison between test pits and actual conditions.

It is impossible to determine from the evidence just how much hardpan was actually encountered. The findings of the contracting officer on the materials dredged were not arbitrary nor grossly erroneous.

16. The first complaint made by plaintiff to defendant to the effect that material was being encountered different from what plaintiff had expected was in a conversation between plaintiff's president and the contracting officer about December 1, 1933, at which time the former expressed his dissatisfaction with the manner in which his organization had made an investigation of the job prior to submitting the bid and also complained of the failure of the defendant to make proper investigation which would reveal the character of the material to be dredged. In that connection a change order was requested on the theory that materials were being encountered different from what should reasonably have been expected from the advertisement for bids. At that time plaintiff had been dredging since April 1933, and the following amounts of material had been removed by the following equipment:

	Cubic yards
Hydraulic Dredge *Dudley*	339, 740
Hydraulic Dredge *No. 3*	539, 005
Hydraulic Dredge *Christobal*	365, 199

The *Dudley* had been unable to dredge to grade and the other two dredges had been unable to dredge to grade except in certain parts of the area.

Prior to that time, beginning as early as July 1933, defendant's representatives began complaining of the progress which was being made and to urge that other dredges be put

on the job, including a more powerful hydraulic dredge and a dipper dredge. Plaintiff indicated its willingness to accede to defendant's request and in its letter of July 15, 1933, described the *Christobal* as a dredge capable of performing satisfactorily on the job. August 11, 1939, plaintiff advised defendant that it had encountered ledge rock and on August 26, 1933, defendant's contracting officer advised plaintiff that his investigations indicated that the material encountered was ledge rock within the meaning of the specifications. Defendant's letter further stated that the plaintiff would be required to remove such portion of the material overlying this ledge rock as in the opinion of his office could be removed by the plant specified in plaintiff's bid and in its agreement prior to the award of the contract to include a dipper dredge in its plant equipment. The contracting officer ultimately ruled that the overlying material could be removed by such plant to within one foot of ledge rock and it was removed by plaintiff without additional cost to defendant. The ledge rock encountered above contract depth was excepted from plaintiff's contract.

17. When plaintiff failed to complete the work by December 1, 1933, the contract completion date, defendant, in making payment for work done in December 1933, deducted $2,600 as liquidated damages. January 5, 1934, plaintiff protested that deduction on the ground that its failure to complete the contract by December 1, 1933, had in no way damaged the defendant. January 9, 1934, defendant's contracting officer advised plaintiff that the fact that no damage might have been suffered by the defendant was immaterial and that he was without authority to waive the liquidated damages. These liquidated damages, amounting to $2,600, were subsequently refunded and paid to plaintiff by the defendant.

18. March 28, 1934, plaintiff filed a claim for an increase by way of adjustment in price in the amount of $170,048.06 and an extension of time of 106.3 days primarily by reason of its contention that a much greater amount of hardpan and compacted gravel had been encountered than was to have been anticipated from the drawings and specifications. In that claim the amount of hardpan was estimated as 435,700

cubic yards and the amount of compacted gravel 189,810 cubic yards whereas plaintiff contended that no more than 100,000 cubic yards of this material was reasonably to have been expected from the plans and specifications. April 16, 1934, the contracting officer denied all items in that claim with the following statement with respect to the claim on the character of material encountered:

> ITEM 1. *Claim on character of material.*—The total quantity of 435,700 cubic yards of hardpan claimed by you to exist is equivalent to a depth of 11.5 feet above the overdepth grade over the portion of the area in question—in other words, that all material below a plane 10.5 feet below datum of 570.8 is hardpan. From the information obtained from the two test pits excavated on the north side of the channel at stations 21 and 24, it is evident that hardpan is not encountered above a plane 19 feet below datum.
>
> The fact that the engineer's estimate for this work contemplated that 100,000 cubic yards of material would be excavated by dipper dredge, is no guaranty of the quantity of hardpan in the contract area.
>
> The hydraulic dredges which you placed upon the work are not as powerful as the dredge assumed in the engineer's estimate. Hence, it is natural that the quantity of material necessary for you to remove by dipper dredge would be considerably greater that that assumed in the engineer's estimate. Before awarding you this contract, this office realizing that the hydraulic dredges specified by you would experience considerable difficulty, requested you in letter of January 21, 1933, to include in your specified plant "a dipper dredge of adequate power and capacity to remove such materials other than ledge rock which the hydraulic dredges that you specify are unable to move." This you agreed to do in your letter of January 24, 1933. Without such assurance, the contract would never have been awarded to you. Our letter of January 21, 1933, further went on to state:
>
> "In our opinion, there are classes of material to be encountered in the area which a hydraulic dredge of ordinary design may not be able to remove, and it is believed that a contractor undertaking to work should be prepared to handle this material with a dipper dredge."
>
> I think it is evident, from a reading of our letter of January 21, 1933, that the United States did not guarantee the capacity of the 10″ and 16″ dredges which you

specified, and that we expected that the use of such small equipment would necessitate a corresponding increase in the amount of dipper dredging. Furthermore, paragraph 26 of the specifications very clearly states that the United States does not guaranty the capacity of your specified plant. Most certainly, if this statement had not been so clearly made in the specifications, I would have inserted it in the contract before submitting it to you for signature.

Your attention is also invited to the fact that the few probings that were made in the contract area prior to advertisement, were for the purpose of establishing the probability of encountering ledge rock above the required grade. The results of these probings were shown on Sheet No. 1 of the contract drawings only as general information. The entire results of the probings were shown and it cannot be alleged that any "disclosures" were concealed from bidders. If any bidder attempted to interpret the probings as indicating the character of the overburden, he did so on his own responsibility.

With regard to the 189,810 cubic yards of compacted gravel claimed by you to have been encountered in the turning basin and between channel stations 0–15, it is noted that this represents about 12½ percent of the total quantity of material in the contract. The specifications did not attempt to describe every class of material to be encountered in the work. I do not see how any such intent on our part could be read into them. The fact that they stated that the materials to be removed were *believed* to be of a certain character, and then went on to state that bidders were expected to examine the work, indicated that no exact description was intended. As a matter of fact, certain quantities of mud and silt were present, which were much easier to remove than the materials mentioned in the specifications. One foot of such soft material over the entire area would amount to 82,000 cubic yards. I am therefore of the opinion that the existence of any such quantity of gravel is within the limit of error of the general description of materials contained in paragraph 13 of the specifications.

On appeal to the Chief of Engineers, the action of the contracting officer with respect to the character of material encountered was affirmed on August 31, 1934, the letter of affirmation containing the following statement:

I find that the contractor did not place adequate plant on the work, that all information was made available to bidders and was the same as that upon which the Government estimate was based, that the material as actually found was not materially different from that contemplated by paragraph 13 of the specifications and the results of probings furnished bidders, and that there is no basis for the claim for increased payments or extension of the contract time.

19. December 3, 1934, plaintiff requested an extension of time and an adjustment in price on the 73,000 cubic yards then estimated as remaining to be dredged on the ground that the channel from its dredging area to the disposal areas in the lake had been blocked by another party having a contract with the defendant thereby preventing plaintiff from using scows to carry the material dredged to the disposal areas and that as a result plaintiff had been required to dig such material by dipper dredge, cast it back into the channel, and then remove the material from the channel with its hydraulic dredges. December 7, 1934, defendant issued a change order which read in part as follows:

It has been determined that:

a. Due to the failure by the contractor in Section A, Monroe Harbor, Michigan, adjoining the contract area covered by your contract, to complete his work on scheduled time, a practicable channel for the towing of scows between said contract area and the allotted dumping grounds in Lake Erie has not existed during the period of your contract.

b. It has not been possible, therefore, to dredge certain material by dipper dredge and transport the same in scows to the dumping grounds in Lake Erie.

c. It has become necessary, in order to complete the contract, to remove approximately 162,000 cubic yards of material by hydraulic dredge, which material would have been removed by dipper dredge if a practicable channel to Lake Erie had existed.

d. The character of this material is such that its removal by hydraulic dredge is more expensive in cost and time than by dipper dredge.

e. The additional cost to the contractor by reason of having to adopt hydraulic methods for the removal of this material is $39,200.00 and the additional time required for completion of the contract because of the

necessary adoption of such methods is 170 calendar days.

f. Because of the above changed conditions the contractor is entitled to reimbursement in the above amount of $39,200.00 and an extension of the time for completion of the contract of 170 calendar days exclusive of the period during which no work is required under the contract as provided for in paragraph 3 of the specifications.

It is therefore considered necessary and in the best interest of the United States to modify the above-named contract to provide for the following:

a. That in addition to all amounts earned under the contract, the contractor shall be reimbursed in the amount of $39,200.00 in full payment for all excess costs involved in completing the contract.

b. That the date fixed for completion of the contract shall be September 5, 1934, instead of December 1, 1933, as prescribed in paragraph 3 of the specifications.

c. That all other terms and conditions of the contract shall remain unchanged.

The above change order was accepted by the plaintiff December 10, 1934, "without prejudice to any rights which the contractor has or may have."

20. Plaintiff completed the work covered by the contract, and by letter dated April 11, 1935, the defendant accepted the work as of April 1, 1935, thus fixing the latter date as the completion date. Plaintiff's direct cost in performing the work, as shown by its books, exclusive of overhead and a reasonable rental value for its equipment, was $449,386.83. A fair apportionment of the overhead to the job was $68,713.15, and a reasonable rental value of the equipment $56,500. The total amount received by plaintiff for the work was $197,586.88. In making final payment, defendant deducted $16,800 as liquidated damages on account of the contract not having been completed until eighty-four days after the completion date as extended. In signing the final voucher, plaintiff added thereto the qualification that it was being signed "without prejudice to any and all rights that the R. C. Huffman Construction Company may have against the Government." When the foregoing qualification was called to the attention of defendant's contracting officer, request was made on plaintiff that it indicate the specific

items excepted from the operation of the release, and in response to that request plaintiff advised the defendant on April 20, 1935, that the following items were excepted:

Character of materials	$200,000.00
Remission of liquidated damages	16,800.00
Dredging Raisin River upstream from contract area	1,010.00
Removal of shoaling not embraced in contract	20,000.00
Operation of Dredge *Peru*	34,000.00
Total	271,810.00

April 25, 1935, defendant accepted the release with an explicit denial of any merit to the items excepted from the operation of the release.

21. As heretofore shown, the work covered by the contract extended from a point in the Raisin River out into Lake Erie. Four paper mills which manufactured paper from straw, rags, wood pulp, etc., were located a few miles above the site of plaintiff's work and these mills discharged their refuse into the Raisin River, which found its way into the area being dredged by plaintiff. The specifications contained the following reference to this refuse:

> The Raisin River carries considerable refuse from the paper mills at Monroe and deposits of this material along the river bottom cannot be handled efficiently by bucket or dipper dredges.

The specifications also contained the following provisions with respect to shoaling:

> 17. *Shoaling.*—Should the last examination of the contract work, extended to include the entire area, show shoaling since the previous dredging under the contract, or shoaling for which the contractor is evidently not responsible, and which shall include shoals in the finished channel formed by the natural lowering of side slopes, between the time of dredging and that of the last examination herein referred to, redredging at the contract price, so far as permitted by available funds, may be done if agreeable to both the contractor and the contracting officer.

The specifications provided in detail as to the disposition of excavated material, including the place where such mate-

rial was to be deposited and how the dumping grounds were to be maintained. In addition, the following provision was made with respect to misplaced material:

> 21. *Misplaced material.*—Any material that is deposited elsewhere than in places designated or approved by the contracting officer will not be paid for, and the contractor may be required to redredge such material and deposit it where directed.
>
> Should the contractor, during the progress of the work, lose, dump, throw overboard, sink, or misplace any material, plant, machinery, or appliance, which in the opinion of the contracting officer may be dangerous to or obstruct navigation, he shall recover and remove the same with the utmost dispatch. The contractor shall give immediate notice, with description and location of such obstructions, to the contracting officer or inspector, and when required shall mark or buoy such obstructions until the same are removed. Should he refuse, neglect, or delay compliance with the above requirement, such obstructions may be removed by the contracting officer, and the cost of such removal may be deducted from any money due or to become due the contractor, or may be recovered under his bond.

22. In March 1934 it was found that material had entered a portion of the dredged area and settled to the bottom of the stream with the result that the depth of the water was reduced as much as four feet at places. Defendant's representatives made an examination of the situation and ruled that material from the disposal areas had found its way into the area, thus causing the condition just described. As a result of that determination, the defendant ordered plaintiff to redredge that section.

Plaintiff protested that determination, contending that it was not responsible for the shoaling in question but that the material was a combination of refuse from the paper mills and ordinary river silt. Plaintiff's protest was denied and on appeal to the Chief of Engineers the determination of the contracting officer was affirmed August 31, 1934.

At the direction of the contracting officer, plaintiff redredged the area in question and no payment was made for this work, the basis of payment in that area being for material excavated computed on soundings made before the

job started and soundings made after the job was completed. The record does not show that the findings of the contracting officer and Chief of Engineers were arbitrary or grossly erroneous.

23. After the enactment of the National Industrial Recovery Act on June 16, 1933, plaintiff signed the President's Reemployment Agreement September 6, 1933, such Agreement having been promulgated July 27, 1933. August 8, 1933, plaintiff became bound by the terms of the wage and hour provisions of the Code of Fair Competition for the construction industry. By exceptions made in the signing of the President's Reemployment Agreement and the Code of Fair Competition, the work under the contract involved in this proceeding was exempt from the provisions of the Agreement and the Code.

24. June 26, 1933, the contracting officer advised plaintiff that beginning July 1, 1933, all of the monies which were to be used to make payment for work under the contract involved in this proceeding would be controlled by the National Industrial Recovery Act, that it would be necessary to limit the hours of labor to thirty hours per week except in executive, administrative, and supervisory positions, and that minimum wages should be certain designated amounts per hour. In that letter plaintiff was also advised that any increased compensation to it should be covered by a supplemental agreement. After a conference with plaintiff, the contracting officer forwarded to plaintiff a supplemental agreement providing for minimum wage rates and the application of a thirty-hour week in conformity with the National Industrial Recovery Act. The letter of transmittal stated that the effective date of the agreement would be the first calendar day after receipt by plaintiff of notification of its approval by the Chief of Engineers, U. S. Army. July 3, 1933, after executing the agreement, plaintiff returned it to the contracting officer who forwarded it to Washington for approval by the Chief of Engineers. August 28, 1933, plaintiff received advice from the contracting officer that the agreement was in Washington awaiting approval by the Chief of Engineers. October 12, 1933, the contracting officer advised plaintiff that the Chief of Engineers had "definitely deter-

mined that contracts entered into under regular appropriations under the Engineer Department will not be changed to provide for conversion to the basis of the National Industrial Recovery Act," and the supplemental agreement was not approved by the Chief of Engineers.

25. In the meantime complaint had been made that plaintiff was not conforming to the minimum wage provisions with respect to certain employees and in answer to this complaint the contracting officer on August 28, 1933, advised the National Industrial Recovery Committee for that area that there was no provision in plaintiff's contract setting a minimum wage and that it had been ruled that the employees in question were exempt from the application of the thirty-hour week. November 24, 1933, the contracting officer advised plaintiff of a complaint which had been received by the Chief of Engineers to the effect that plaintiff had not signed the President's Reemployment Agreement, although operating on a Government contract, and requested an answer from plaintiff with respect to such complaint. November 25, 1933, plaintiff advised the contracting officer that it had signed the Reemployment Agreement on September 6, 1933, and the Code of Fair Competition on August 8, 1933, as set out in finding 23. July 23, 1934, the Central Labor Union of Monroe, Michigan, advised plaintiff of complaints which the union had received of the failure of plaintiff to observe the time and pay provisions of the National Industrial Recovery Act and urged that back pay be given its employees from the effective date of the National Industrial Recovery Act at the rate of not less than 40 cents per hour. Plaintiff replied to that complaint July 26, 1934, to the effect that since its contract was entered into prior to the approval of the National Industrial Recovery Act and prior to its signing of the President's Reemployment Agreement, it was exempt from regulations thereunder in the carrying out of this contract. Plaintiff further stated that in view of this situation it would appear that if the rates were increased and made retroactive it would not have any chance of collecting the increase from the Federal Government, but that if the union could show that plaintiff could recover this back pay, plaintiff would be only too glad to make the

increase which the Central Labor Union was urging. After a further communication from the Central Labor Union, in which plaintiff was advised that the contracting officer had advised the labor union that plaintiff would be entitled to file a claim under Public Law No. 369, 73rd Congress, 2nd Session, (the Act of June 16, 1934, 48 Stat. 974) plaintiff, on August 13, 1934, asked the following questions of the contracting officer:

> (1) If we should increase our labor scale from $.30 to $.40 per hour effective immediately, could we recover the additional moneys paid out even though the Monroe contract was exempt and the increases were purely voluntary on our part?
>
> (2) Could we make a claim under this act for increases in wages which have not yet actually been paid out? In other words, could we make a claim for retroactive increases and then make the necessary reimbursement to the individual laborers after the money had been received by us? If this course would be unsatisfactory could we furnish bond guaranteeing that reimbursement would be made and that any moneys due any laborer who could not be located within a reasonable time would be returned to the Government?
>
> (3) Would our rights under the act include recovery of additional compensation insurance and bond premiums which would have to be paid out because of additional payroll expense under either or both of the above-mentioned plans?
>
> (4) Are we entitled to recovery under this act for increases in material and fuel costs since the effective date of the National Recovery Act?

In response to that letter the contracting officer, on September 5, 1934, answered plaintiff's questions with the following information which had been furnished him by the Chief of Engineers:

> 1. The Code of Fair Competition for the construction industry, as approved by the President on January 31, 1934, excludes contracts entered into prior to the effective date thereof. If, however, the contractor has signed and complied with the President's Reemployment Agreement and/or the applicable approved code for the industry concerned additional costs incurred by such compliance on or after August 10, 1933, are proper for settlement

under the Act approved June 16, 1934 (Public No. 369—73d Congress).

2. Public Act No. 369 authorizes the Comptroller General to settle claims of this type. Hence, that office is the final authority on what items will be allowed. The following answers to your specific questions are, therefore, merely the opinion of this office:

(1) Yes, provided the contractor institutes all of the requirements of the code.

(2) The contractor could not recover under said Act any amount not actually paid out.

(3) Additional compensation insurance if required by complete code compliance is considered a proper item in a claim under the Act.

(4) The contractor would not be entitled to recovery under the Act for increases in material and fuel costs since the date of the National Recovery Act. The additional costs must have been incurred since August 10, 1933, as provided in the above-mentioned Act (Public, No. 369, 73rd Congress), and after the date the company instituted full code compliance.

The Monroe Business Men's Association had also urged plaintiff in August 1934 to increase its wages in conformity with the National Industrial Recovery Act and suggested that plaintiff could recover on account of such increase.

26. Thereafter, effective August 15, 1934, plaintiff increased the hourly rate of some of its employees from 30 to 40 cents and continued to pay them at the rate of 40 cents per hour until the work was completed April 1, 1935. The total amount of such increases on account of work done after the effective date of the increase, shown from payrolls available at this time, was $976.90 and the compensation insurance paid thereon was $82.70.

27. In completing its dredging work under this contract, plaintiff had brought on the job the Dredge *Peru* which was owned by the Gahagan Construction Company, a subcontractor of plaintiff on another contract which had been entered into by plaintiff with the defendant on April 26, 1934, for certain dredging work in the Detroit River. The Detroit River contract required compliance with the wage provisions of the National Industrial Recovery Act and provided that the employees of the contractor and its sub-

contractors should not be paid less than $1.20 per hour for skilled labor and 50 cents per hour for unskilled labor. In carrying out its work under its subcontract with plaintiff on the Detroit River job, the Gahagan Construction Company was paying union wages to its crew on the Dredge *Peru*, as was required by the National Industrial Recovery Act, which wages were higher than were being paid by plaintiff for similar work on the Monroe Harbor job. When the Dredge *Peru* was brought on the Monroe Harbor job, its crew accompanied it and plaintiff paid the crew the same rates that prevailed on the Detroit River job. The difference between the amount paid the crew for the time it was on the Monroe Harbor job and the amount which would have been paid these employees at the rate prevailing for similar employees on the Monroe Harbor job was $3,168.84 plus insurance of $272.22.

28. February 7, 1935, plaintiff let a subcontract to the Great Lakes Dredge & Dock Company for certain dredging under the contract involved in this proceeding at a price of 65 cents per cubic yard, and plaintiff paid that subcontractor at that rate for dredging 49,827 cubic yards. The record, however, is insufficient to show the extent to which that price was increased, if any, by the National Industrial Recovery Act.

29. Plaintiff duly filed its claim under the Act of June 16, 1934, for reimbursement of the increased costs caused by the National Industrial Recovery Act, and that claim was duly approved for payment by the War Department. The General Accounting Office denied the same. Plaintiff has not been paid any of the items claimed in this case.

The court decided that the plaintiff was entitled to recover only for the increased labor costs incurred as the result of the enactment of the National Industrial Recovery Act.

WHITAKER, *Judge*, delivered the opinion of the court:

The plaintiff had a contract with the defendant for the dredging of a portion of Raisin River at Monroe Harbor, Michigan. In carrying it out it encountered considerably more hardpan than it had expected. It sues to recover addi-

tional compensation, claiming that it is entitled to an equitable adjustment on this account. It also sues for the cost of removing some material which collected in the channel of the river after the dredging had been done, and to recover liquidated damages deducted, and, finally, for increased costs incurred as the result of the enactment of the National Industrial Recovery Act. (U. S. Code, Title 15, section 701)

This is another case in which there has been joined two separate and distinct causes of action, one a suit under a contract, and the other a suit arising under an Act of Congress. This is bad pleading, but since this case has been pending here for some time we overlook it and proceed to consider the two causes of action.

The largest claim is that resulting from the removal of a large quantity of hardpan. The plaintiff says that no one expected to encounter this hardpan and, therefore, for this it is entitled to an equitable adjustment under article 4 of the contract. The defendant says that it gave no warranty that hardpan would not be encountered, and in no way misrepresented the situation, and that article 4 is inapplicable.

In 1932 the defendant issued a "Preliminary Notice of the Invitation for Bids for Dredging in Monroe Harbor, Michigan." This notice said:

> This office expects to invite proposals prior to the opening of the 1933 working season for the dredging of approximately 3,800,000 cubic yards of material at Monroe Harbor, Michigan—the work to commence on or before the beginning of the season and to be completed by December 1, 1933. In order that prospective bidders may have an opportunity to examine the area of the proposed work before the close of the present season, the following information relative thereto is given.
>
> * * * * *
>
> The material to be removed is believed to be sand, clay, and boulders. However, the price bid per cubic yard for dredging will include the cost of removing all materials encountered, including snags, stumps, trees, underbrush, piling, revetment, stone-filled cribs, and the concrete sub-structure of the Monroe Light. The removal of ledge rock, if encountered, will not be

required. Probings made by this office indicate that ledge rock will be encountered, if at all, only at the extreme upper end of the proposed work.

* * * * *

Copies of a preliminary location map showing the general features of the proposed work are available in this office and may be obtained, without charge, on request.

The information and data given in this notice are preliminary and tentative only, and are subject to change without notice. More detailed information will be issued at the time of invitation for bids.

Plaintiff received this notice and sent two of its employees to make an investigation of the site. They probed the area to be dredged with an iron pipe and bored 24 or 25 test holes with an auger. This auger penetrated all material in the area, including hardpan, but excepting ledge rock and boulders, and indicated whether the material through which it had passed was hard or soft, but it did not accurately indicate the character of the material.

Subsequent to this the defendant issued its formal invitation for bids. To this was attached the specifications. Paragraph 13 thereof reads as follows:

13. *Character of materials.*—The materials to be removed are believed to be sand and clay, with some hardpan and boulders, and, in addition: revetment, foundation piling, underbrush, stumps, snags, trees, etc., along the banks of the United States and Monroe Canals; piling, stone-filled cribs, etc., within the contract area; the concrete foundation of Monroe Light; refuse from the Monroe paper mills; and possibly buildings or portions thereof not removed by the owners from within the limits of the proposed work.

Bidders are expected to examine the work and decide for themselves as to its character and to make their bids accordingly. In the event that materials, structures, or obstacles of a materially different character are encountered during the progress of the work, and the cost of their removal or satisfactory treatment obviously would be, in the opinion of the contracting officer, either in excess of, or less than the unit price bid by the contractor, the contracting officer, in either alternative, will then proceed in accordance with the provisions of article

4 of standard Government Form No. 23, or any authorized revision thereof.

Attached also to the invitation for bids was a map showing the location of places probed by the defendant. This map contained the following data on probing:

Data on probing

No.	Depths		Penetration	Hammer		No. of blows	Remarks
	Earth	Rock		Weight	Drop		
1	8.3′	18.9′	10.6′	100#	6.0′	72	5′ in first ten blows.
2	8.1	18.1	10.0	100	5.0	100	4′ soft.
3	9.4	18.2	8.8	100	5.0	135	4′ soft.
4	12.0	18.9	6.9	100	5.0	127	Hard all the way.
5	10.8	19.7	8.9	100	5.0	175	" " " "
6	12.8	21.85	9.05	100	5.0	125	" " " "
7	11.8	21.0	9.2	100	5.0	210	" " " "
8	13.1	22.15	9.05	100	5.0	225	" " " "
9	11.6	22.1	10.5	100	5.0	150	" " " "
10	14.6	24.05	9.45	100	5.0	200	" " " "
11	14.1	24.45	10.35	100	5.0	175	" " " "
12	11.2	22.25	11.05	100	5.0	190	" " " "
13	11.0	21.85	10.85	100	5.0	185	" " " "
14	9.8	21.95	12.15	100	5.0	163	3′ soft.
15	9.5	18.35	8.85	100	5.0	250	Hard all the way; rock in doubt.
16	10.0	25.0+	15.0				Not down to rock.
17	6.8	18.5?	11.7				Rock in doubt.
18	10.1	20.3?	10.2	The River Raisin having frozen over, the probing was continued on the ice by churning a ½″ pipe fitted with a steel point to rock or grade.			Rock in doubt.
19	-------	20.8?	-------				Not down to rock.
20	2.8	23.8+	21.0				" " " "
21	2.7	21.3+	18.6				" " " "
22	2.2	22.5+	20.3				No rock.
23	8.0	23.8+	15.8				6′ soft.
24	8.3	23.3+	15.0				6′ "
25	8.2	23.1+	15.0				6′ "

The primary purpose of the above probings was to ascertain the existence of ledge rock, and not to discover the character of materials to be dredged. This responsibility was placed upon the bidder, but the defendant furnished it with such information as it had.

Although this map showed that in a number of different holes the probing was "hard all the way," requiring from 125 to 250 blows of a 100-pound hammer to drive the rod from 7 to 11 feet, the defendant did not deduce therefrom that hardpan necessarily would be encountered, but it thought that it might be, and hence included in its specifications of materials to be dredged, "some hardpan." However, when the defendant made its estimate of what the work ought to cost, it did not figure on any hardpan; but this fact was not known to the plaintiff at the time it submitted its bid.

The plaintiff encountered very much more hardpan than had been expected. The defendant estimated that of the materials dredged about 175,000 cubic yards were hardpan. The plaintiff says that there were about 700,000 cubic yards. Neither party's figures are based upon accurate information, but it is evident that quite a good deal more hardpan was encountered than anybody expected.

However, there was certainly no misrepresentation by the defendant, nor was there any warranty that no hardpan would be encountered. The specifications put plaintiff on notice that it might expect to encounter some hardpan, and bidders were required "to examine the work and decide for themselves as to its character and to make their bids accordingly."

But plaintiff says that whether or not there was a misrepresentation, it is entitled to an equitable adjustment under article 4 of the contract. This article provides in part: "Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, * * *" the attention of the contracting officer was to be called thereto and he was to investigate the conditions, and if they were found to be materially different, then he was to make an equitable adjustment of the amount to be paid and the limit of time within which the contract was to be completed. Before plaintiff is entitled to the benefit of this article it must show that the conditions at the site were materially different from those shown on the drawings or indicated in the specifications. They were not different from the conditions shown on the drawings. These drawings showed that certain probings had been soft for a certain distance and "hard all the way" in others. So far as it appears, that information was correct.

Were conditions different from those indicated in the specifications? Paragraph 13 of the specifications provided:

> The materials to be removed are believed to be sand and clay, with some hardpan and boulders, and, in addition: revetment, foundation piling, underbrush, stumps, snags, trees, etc., along the banks of the United

> States and Monroe Canals; piling, stone-filled cribs, etc., within the contract area; the concrete foundation of Monroe Light; refuse from the Monroe paper mills; and possibly buildings or portions thereof not removed by the owners from within the limits of the proposed work.
>
> * * * * *

This was an indication that the natural riverbed was principally sand and clay, with a minor amount of hardpan and boulders, and that there were, in addition, the other things mentioned. It seems clear to us that a contractor would understand from this specification that the amount of hardpan to be encountered would not be great. If in fact the amount actually encountered was as great as claimed by the plaintiff, we would conclude that the conditions did materially differ from that indicated by the specifications. Plaintiff says that of the 1,592,608 cubic yards of material dredged, 714,741 cubic yards were hardpan. This is about fifty percent, much more than was indicated by the expression "some hardpan." On the other hand, the defendant says that 175,186 cubic yards were hardpan, or 11 percent. We think the expression "some hardpan" would put the contractor on notice that it might expect as much as 11 percent.

Section 13 of the specification provides that in the event that materials are encountered of a character materially different from those indicated in the specifications, or discovered as a result of the bidder's inspection, and the cost of their removal is greater than the price bid, then the contracting officer was required to proceed in accordance with article 4 of the contract. Article 4 requires him to investigate conditions, and if found materially different from those indicated, to make such changes as he might find necessary, and to increase the price to be paid in such amount as he should consider equitable.

The proof shows that he did investigate conditions, and found that of the materials dredged only eleven percent were hardpan, instead of fifty percent, as claimed by the plaintiff. This finding is conclusive on us, unless we determine that it is arbitrary or grossly erroneous, because of the provisions of article 15, providing that—

> * * * all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. * * *

There is no proof that this finding was arbitrary or grossly erroneous. The contracting officer's figures are not accurate, but neither are those of plaintiff. Which figures are the more accurate we are unable to say. In such circumstances, it is obvious that we cannot say that the contracting officer's action was arbitrary or grossly erroneous. Therefore, we must take it as true that only 11 percent was hardpan. This was not a material difference from the conditions indicated by the specifications.

Article 15 of the contract also forecloses plaintiff's recovery for the removal of the deposits in the channel after it had been dredged. The plaintiff claims that the removal of this material comes under article 17 of the specifications, while defendant says it comes under article 21.

Article 17 provides:

> *Shoaling.*—Should the last examination of the contract work, extended to include the entire area, show shoaling since the previous dredging under the contract, or shoaling for which the contractor is evidently not responsible, and which shall include shoals in the finished channel formed by the natural lowering of side slopes, between the time of dredging and that of the last examination herein referred to, redredging at the contract price, so far as permitted by available funds, may be done if agreeable to both the contractor and the contracting officer.

Article 21 provides:

> 21. *Misplaced material.*—Any material that is deposited elsewhere than in places designated or approved by the contracting officer will not be paid for, and the contractor may be required to redredge such material and deposit it where directed.
>
> Should the contractor, during the progress of the work, lose, dump, throw overboard, sink, or misplace any material, plant, machinery, or appliance, which in the

> opinion of the contracting officer may be dangerous to or obstruct navigation, he shall recover and remove the same with the utmost dispatch. The contractor shall give immediate notice, with description and location of such obstructions, to the contracting officer or inspector, and when required shall mark or buoy such obstructions until the same are removed. Should he refuse, neglect, or delay compliance with the above requirement, such obstructions may be removed by the contracting officer, and the cost of such removal may be deducted from any money due or to become due the contractor, or may be recovered under his bond.

Plaintiff claimed that the material it was required to remove was refuse from a paper mill up the river from the site of the work. The contracting officer found that it was material which the plaintiff had placed on the bank and which had sloughed off into the water. The plaintiff appealed from the finding of the contracting officer, but his decision was affirmed. Article 15 makes his decision final and conclusive, and we cannot say that this decision was either arbitrary or grossly erroneous.

Plaintiff's claim for the remission of liquidated damages is based upon the discovery of an unexpected amount of hardpan. Article 9 relieves the contractor from the assessment of liquidated damages for delays due to "unforeseeable causes beyond the control and without the fault or negligence of the contractor." The contractor was required to notify the contracting officer of any delays, who in turn was required to "ascertain the facts and extent of the delay, and his findings of facts thereon shall be final and conclusive, subject to appeal to the head of the department * * *." The contractor first complained of hardpan on December 1, 1933, after the work had been going on for ten months. The contracting officer held that it was not entitled to the extension of time it requested. This ruling was affirmed by the Chief of Engineers. We find that it was neither arbitrary nor erroneous, and it is, therefore, conclusive.

Plaintiff's last claim is for increased costs incurred as a result of the enactment of the National Industrial Recovery Act.

Plaintiff's instant contract was exempt from the provisions of the National Industrial Recovery Act and the President's Reemployment Agreement and the Code of Fair Competition; nevertheless, considerable pressure was brought to bear on plaintiff to increase wages and shorten hours on this contract as prescribed in the President's Reemployment Agreement, and plaintiff finally did so. At first the contracting officer had told plaintiff that it would be required to comply with the National Industrial Recovery Act, and that the contract price would be adjusted accordingly; but later plaintiff was advised that the Chief of Engineers had overruled the contracting officer and had held that the contract would not be converted to one under the National Industrial Recovery Act. As unreasonable as it may seem, the contracting officer, nevertheless, transmitted to plaintiff later a complaint received by the Chief of Engineers of plaintiff's failure to comply with the President's Reemployment Agreement on this contract, and asked plaintiff what it had to say about it.

A little later the Central Labor Union got after plaintiff and demanded that it pay PRA wages from then on, and, in addition, to pay its employees back PRA pay. The plaintiff replied that it would be glad to do so if the defendant would reimburse it. The Union then took up with the contracting officer the matter of whether or not the Government would reimburse the contractor, and reported to plaintiff that the contracting officer had said it was entitled to reimbursement under the Act of 1934 (U. S. Code, Title 41, section 28). The plaintiff took the matter up with the contracting officer directly, who confirmed what he had told the Union people.

Then the Monroe Business Men's Association came to plaintiff urging that it comply with the President's Reemployment Agreement.

Yielding to all this pressure, plaintiff increased wages of some of its employees from 30 to 40 cents an hour, and continued to pay these wages until the contract was completed. This increased its costs for wages and compensation insurance by the amount of $1,059.60. Except for the passage

of the National Industrial Recovery Act, neither the contracting officer nor the Labor Union nor the Monroe Business Men's Association would have said a word about the wages plaintiff was paying. This law prompted them to do it; it set in motion the forces that made it necessary for plaintiff to increase wages and, therefore, we are of opinion that the increase can be fairly said to be the direct result of the enactment of the National Industrial Recovery Act. See *National Fireproofing Corp.* v. *United States*, Nos. 44004 and 44067, decided June 7, 1943 (99 C. Cls. 608).

Plaintiff is entitled to recover on this account the sum of $1,059.60.

Plaintiff also claims that the increased wages which it paid the crew of the dredge *Peru* was the result of the enactment of the National Industrial Recovery Act. We do not think so. The crew of this dredge were being paid National Industrial Recovery Act wages on another job. When the dredge and crew were brought to this job plaintiff necessarily had to continue to pay the same wages; but it did not have to bring the dredge and crew to this job; it might have used a different dredge or a different crew whom it would not have been required to pay NIRA wages. The increase was a result of its own act.

Plaintiff lost a great deal of money on this contract, but the defendant was not responsible therefor.

On the whole case the plaintiff is entitled to recover the sum of $1,059.60. Judgment for this amount will be entered. It is so ordered.

MADDEN, *Judge*; LITTLETON, *Judge*; and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

FRAZIER-DAVIS CONSTRUCTION COMPANY v. THE UNITED STATES

[No. 44803. Decided October 4, 1943]

On the Proofs

Government contract; labor from relief rolls.—Following the decision in *Seeds & Derham* v. *United States*, 92 C. Cls. 97, it is *held* that plaintiff is not entitled to recover where, under the terms of the contract, labor was taken from the relief rolls, and where the proof shows that the labor so obtained was average relief-roll labor, and there is no showing that any rules and regulations were enforced which the contractor did not know about in advance, or that the labor was of a quality below that which the contractor had a right to expect.

Same; quantum meruit.—Judgment on the basis of *quantum meruit* can not be allowed where there is a valid contract between the parties.

Same.—Where the Government in the invitation for bids or in specifications makes a misrepresentation of material fact or conceals material facts and information known to it but not available to or known to the bidder, damages by way of excess costs may under the implied terms of the contract be recovered in a suit on the contract.

Same.—In the instant case it is *held* there was no misrepresentation by defendant of any fact which it was under a legal duty to disclose to bidders, or of any fact known to it and unknown and unavailable to bidders; and the proof does not show fraud, duress, accident, or such mistake as would justify the application of equitable principles under the equitable jurisdiction conferred upon the Court of Claims by Section 145 of the Judicial Code. (U. S. Code, Title 28, Section 250.)

Same; decision of contracting officer final under terms of contract.—Where under the provisions of the contract the decisions of the contracting officer upon the facts, when affirmed by the head of the department, were final; and where such findings are not shown to have been arbitrary or grossly erroneous; it is *held* that plaintiff is not entitled to recover.

The Reporter's statement of the case:

Mr. M. Walton Hendry, for the plaintiff.

Mr. William A. Stern, II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

Plaintiff seeks to recover $400,666.50 as damages for alleged breach of contract, representing alleged excess costs plus

profit of performing certain items of work called for by a unit price, Works Progress Administration contract, with the defendant, acting through the Bureau of Reclamation, Department of the Interior, dated December 16, 1935. The claim is based on the ground that the defendant breached the contract by failing to furnish sufficient and qualified labor from relief rolls or otherwise to perform the work as specified and at the price bid therefor. The claim made grows out of the excess costs to plaintiff over the amount of the unit prices bid for placing reinforcing steel and concrete.

In the alternative plaintiff seeks to recover $399,077.33 including profit under *quantum meruit* on the ground that it made a mistake in the unit prices bid for placing reinforcing steel and concrete as compared to the estimate of defendant's engineers of the cost of doing such work which estimate was not known or communicated to plaintiff before it made its bid or at the time it was accepted. It is asserted by plaintiff that it did not know and defendant did know that the relief labor which the contract required be used on the work would be inefficient and unqualified and that the contract made on plaintiff's bid should be set aside because this information was not communicated to plaintiff.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff, a Missouri corporation having its principal place of business in St. Louis, entered into a contract with defendant dated December 16, 1935, through the Bureau of Reclamation, Department of the Interior, for the construction of four concrete Wash Siphon structures, All-American Canal System, Boulder Canyon Project, Arizona-California-Nevada. All of the work called for by the contract and specifications on the basis of which plaintiff made its bid was in the State of California. The contract was signed by plaintiff on December 30, 1935, and, after approval by the head of the Interior Department of the award of the contract to plaintiff, the contract was signed by the defendant by R. F. Walter, Chief Engineer, Bureau of Reclamation, as contracting officer, January 16, 1936.

2. The contract was the standard Works Progress Administration Form, Approved September 26, 1935, prepared under and in accordance with the Rules and Regulations issued by the President under the Emergency Relief Appropriation Act of 1935, approved April 8, 1935. These regulations prescribed the relief labor and other labor provisions of the contract.

3. The pertinent labor provisions of the contract upon the basis of which plaintiff made its bid, provide as follows:

> Article 19. *Employment Services.*—(a) With respect to all persons employed on projects, except as otherwise provided herein, (a) such persons shall be referred for assignment to such work by the United States Employment Service, or such other employment agency designated by the Works Progress Administration, and (b) preference in employment shall be given to persons from the public relief rolls, and, except with the specific authorization of the Works Progress Administration, at least ninety percentum (90%) of the persons employed on any project shall have been taken from the public relief rolls: *Provided, however,* That, expressly subject to the requirement of subdivision (b), the supervisory, administrative and highly skilled workers on the project, as defined in the specifications, need not be so referred by the United States Employment Service or such other employment agency designated by the Works Progress Administration.
>
> (b) All organized labor, skilled and unskilled, when organized labor is desired and requested by the contractor, which is employed upon projects prosecuted under contract shall be supplied by the employment agencies designated by the United States Employment Service or Works Progress Administration, from the membership of recognized unions, with preference, first, to those members of such unions who constitute regular employees of the contractor and who are on the local public relief rolls, second, to other members of such unions who are on the relief rolls, and upon the exhaustion of union members on such rolls, to any other members of the union. In the event, however, that qualified workers are not made available from the membership of the unions within forty-eight hours (Sundays and holidays excepted) after a request therefor is filed by the contractor, and the employment agency has notified the unions of the receipt of such request, such labor may

be chosen by the contractor from other qualified workers, supplied by employment agencies designated by the United States Employment Service or Works Progress Administration.

(c) No person under the age of sixteen years and no one whose age or physical condition is such as to make his employment dangerous to his health or safety, or the health and safety of others, may be employed on the project. This paragraph shall not be construed to operate against the employment of physically handicapped persons otherwise employable where such persons may be safely assigned to work which they can ably perform.

(d) Except as otherwise specifically provided in this contract workers who are qualified by training and experience and certified for work on the project by the United States Employment Service shall not be discriminated against on any grounds whatsoever.

Paragraph 19 of the specifications reads as follows:

19. *Employment services.*—Pursuant to authorization of the Works Progress Administration, skilled labor in all or any number of the following classifications will be exempted from the requirement of article 19 (a) of the contract that 90 percent of the persons employed on the project shall be taken from the public relief rolls, if the United States Employment Service or other employment agency designated by the Works Progress Administration certifies in writing to the Bureau of Reclamation that skilled labor in such classifications is not available from relief sources:

Blacksmith, drill sharpener.
Mechanic, repairman.
Operator, bulldozer.
Operator, crane or derrick.
Operator, drill sharpener.
Operator, Diesel engine.
Operator, locomotive.
Operator, mucking machine.
Operator, power shovel or dragline.
Operator, tractor, 60 hp. or larger.
Operator, cableway.
Operator, concrete equipment, one cubic yard or larger.
Operator, truck, five-ton or larger.
Operator, Lynn truck.
Operator, Letorneau scraper.
Operator, pile driver.

Rigger.
Timberman, tunnel.
Welder.

Administration Order No. 26, dated September 26, 1935, of the Works Progress Administration, paragraphs 2, 3, 4, and 5, reads as follows:

2. I hereby authorize the several State Works Progress Administrators, or representatives designated by them in writing, to exempt projects from the requirement of Paragraph (c) of Part III of said Regulation No. 1 that 90% of all persons working on a project shall have been taken from the public relief rolls.

3. No exemption authorized by Paragraph 2 of this Order shall be granted unless the United States Employment Service (or such other agency for the placement of workers as may be designated by the Federal Works Progress Administrator to act in lieu of the United States Employment Service) shall have certified to such States Works Progress Administrator, or a representative designated by him, that there are no qualified workers on the public relief rolls available within the vicinity of the project. The term "within the vicinity of the project" shall be construed to mean an area within which the worker may travel to and from work without unusual expenditure of time or excessive cost for transportation.

4. In the event that an exemption is granted for a project pursuant to the provisions of Paragraph 2 of this Order, the United States Employment Service (or such other agency for the placement of workers as may be designated by the Federal Works Progress Administrator to act in lieu of the United States Employment Service), in assigning workers to such project who are not taken from the relief rolls, shall give preference, first, to bonafide residents of the political subdivision which is financing, in part, the construction of the project and, second, to bonafide residents of the county in which the project is located, to the extent that labor technically qualified to perform the work is available in such political subdivision and county.

5. The foregoing provisions of this Order are subject to the further condition that when organized labor is desired and requested by the contractor, all organized labor, skilled and unskilled, employed upon the project shall be supplied by the employment agencies designated by the United States Employment Service (or such

other agency for the placement of workers as may be designated by the Federal Works Progress Administrator to act in lieu of the United States Employment Service) from the membership of recognized unions, with preference, first, to those members of such unions who constitute regular employees of the contractor and who are on the local public relief rolls, second, to other members of such unions who are on the relief rolls, and upon the exhaustion of union members on such rolls, to any other members of the union. In the event, however, that qualified workers are not made available from the membership of the unions within forty-eight hours (Sundays and holidays excepted) after a request therefor is filed by the contractor, and the employment agency has notified the unions of the receipt of such request, such labor may be chosen by the contractor from other qualified workers, supplied by employment agencies designated by the United States Employment Service (or such other agency for the placement of workers as may be designated by the Federal Works Progress Administrator to act in lieu of the United States Employment Service). The provisions of this paragraph are subject to the further requirement that the preponderance of labor employed upon a project shall be taken from bonafide residents of the political subdivision which is financing, in part, the construction of the project, and the remainder from the county in which the project is located, to the extent that labor technically qualified to perform the work is available therein.

Paragraph 14 of the contract specifications provides, so far as material here, as follows:

Protests.—If the contractor considers any work demanded of him to be outside the requirements of the contract, or considers any record or ruling of the contracting officer or of the inspectors to be unfair, he shall immediately upon such work being demanded or such record or ruling being made, ask for written instructions or decision, whereupon he shall proceed without delay to perform the work or to conform to the record or ruling, and within ten (10) days after date of receipt of the written instructions or decision, he shall file a written protest with the contracting officer, stating clearly and in detail the basis of his objections. Except for such protests or objections as are made of record in the manner herein specified and within the time limit stated, the records, rulings, instructions, or decisions of the contracting officer shall be final and conclusive.

Plaintiff did not conform to the above-quoted provisions of paragraph 14 of the specifications during the performance of the contract.

4. On November 4, 1935, prior to the opening of competitive bids on November 25, 1935, the defendant, through its chief engineer of the Bureau of Reclamation, prepared for its own use an estimate for the performance of the contract work on the basis of the contract, specifications, and drawings, known as "engineers' estimate" which amounted to a total of $821,432.50 for the estimated quantities set forth in the specifications and bid form, and which amount included an amount for a contractor's profit. Plaintiff's estimate and formal bid of unit prices for the listed estimated quantities of the 69 items entering into the complete construction of the four Wash Siphon structures specified, amounted to a total of $489,527.50 including profit. The bid form setting forth a description of the various items of work and the estimated quantities of each item, constituted the first nine pages of the printed specifications. Paragraph 5 of the specifications provided as follows:

> *Quantities and unit prices.*—The quantities noted in the schedules are approximations for comparing bids, and no claim shall be made against the Government for excess or deficiency therein, actual or relative. Payment at prices agreed upon will be in full for the completed work and will cover materials, supplies, labor, tools, machinery, and all other expenditures incident to satisfactory compliance with the contract, unless otherwise specifically provided.

Paragraph 17 of the specifications fixed specific hourly minimum rates of wages for skilled, unskilled, and certain semi-skilled labor and in addition stated that "rates for semi-skilled labor in classifications other than shown in the above wage scale shall be fixed so as to fall between the minima fixed for skilled and unskilled labor and shall bear the normal relation to these as exists in the locality."

Almost the entire difference in the estimate of defendant's engineer and plaintiff's estimate and formal bid was in the two items for placing reinforcing steel and concrete. Plaintiff bid one cent ($0.01) per pound for placing reinforcing

bars; six dollars ($6.00) per cubic yard for placing concrete in slabs, and eight dollars and fifty cents ($8.50) per cubic yard for placing concrete in structures. Under paragraph 23 of the specifications the Government agreed to furnish all cement, sand, broken rock or gravel for use in concrete; all reinforcing bars; steel sheet-piling, together with other items of material mentioned in this paragraph "and also all other materials not specifically mentioned in this paragraph or in paragraph 24 that will become a part of the completed construction work." Paragraph 24 of the specifications specified the materials to be furnished by the contractor which included all form materials, and also provided that "The contractor will be required to haul all these materials as well as all the materials delivered to the contractor by the Government. The cost of hauling all the materials described above and of furnishing all the materials required to be furnished by the contractor shall be included in the unit prices bid in the schedules for the work for which the materials and hauling are required."

Prior to the opening of bids on November 25, 1935, defendant's resident engineer, Bloodgood, also prepared an estimate of the probable cost of the project covered by the contract in suit, which also included an amount for a contractor's profit. The "engineers' estimate" hereinbefore mentioned and the Bloodgood estimate did not vary more than 5% in the total. Both estimates by defendant's engineers were based upon the terms, conditions, and provisions of the contract, specifications and detailed drawings, their knowledge and experience in such work and the labor conditions existing in the particular area of the contractual work and represented their estimate of the fair and reasonable amount for which the work could be performed at a reasonable profit in the area and under the terms and conditions of the contract and specifications.

In making these estimates of the probable cost including overhead and profit of performing the work as called for and required by the contract and specifications upon the basis of which competitive bids had been requested, the Government engineers had no information or knowledge of any facts or conditions not known by and available to bidders when such

bidders, including plaintiff, submitted their bids to the Government.

5. The Chief Engineer, Bureau of Reclamation, defendant's contracting officer, appointed a Board of Engineers to open the bids which had been called for and to recommend an award of the contract. This Board was composed of R. C. E. Weber, Superintendent of the Yuma Project, which included construction work other than the Wash Siphon structures; Grant Bloodgood, Engineer, All-American Canal, and R. B. Williams, Construction Engineer, All-American Canal and of the work to be performed under the contract for which bids were being opened.

This Board of Engineers opened the bids and prepared a report dated November 25, 1935, to the Chief of Engineers, U. S. Reclamation Service, advising the contracting officer in part as follows:

> 1. By your endorsement of November 9, 1935, on copy of letter from Construction Engineer, Yuma, Arizona, dated October 26, 1935, subject: "Opening of Bids—Specifications No. 644, 645, and 647, All-American Project," the undersigned were designated a Board of Engineers to make formal report to your office on bids received today, November 25, 1935, at 10:00 A. M. for Wash Siphon Structures at 120 Wash, 424 Wash, Unnamed Wash and Picacho Wash, Specifications No. 645.
>
> 2. *Opening of Bids.*—There were seven (7) bids submitted for the work. Opening of bids was started promptly at 10:00 A. M. Mountain Standard Time, the name of the bidder, name of surety, amount of bid bond, together with total amount bid for each of the four schedules being first read for all seven bids. This was followed by reading the unit prices in each of the four schedules for all the bids received. The reading was completed at 12:15 P. M. Abstracts of bids were recorded by four project employees as the bids were read. All bids were submitted before the hour set for opening. Twenty people attended the opening, including contractors and their representatives, together with equipment and newspapermen, and others. None remained for the detailed reading.
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> * * * * *
>
> 13. *Engineers' Estimate.*—The engineers' estimate of cost was transmitted to the Commissioner by your letter dated November 4, 1935, subject: "Specifications No.

645, Wash Siphon Structures at 120 Wash, 424 Wash, Unnamed Wash and Picacho Wash, All-American Canal System," to which letter reference is made.

The bid submitted by the low bidder is $331,905 or 40.4% below the engineers' estimate. This difference is largely in the items for placing concrete and reinforcing bars. A study of the attached sheet "Items covering concrete and placing reinforcing steel—comparison between four low bidders and engineers' estimate" indicates that all of the four low bidders were well below the estimate on these items, with the low bidder's total being approximately 50% of the estimate. At the prices bid for the remaining items in the schedules it does not appear that the bid was meant to be unbalanced to absorb part of the concrete cost in the remaining items.

Considering that the cost of hauling concrete aggregates up to a total distance of 11 miles must be included in the prices bid, $8.50 per cubic yard for concrete in structures and $6.00 per cubic yard for concrete in floor slabs, it is hard to make any deductions as to how the low bidder arrived at his unit prices.

For the standard of quality required for the concrete work in these structures, the prices used in the engineers' estimate are believed to represent a fair price for the work. This work will require the employment of a large number of high-grade and efficient form carpenters, reinforcing steel workers and laborers. Under the necessity of obtaining this labor from relief rolls with the probability that it will be of less than average efficiency, the low bidder's situation will become a difficult one and a serious loss on the contract can be expected.

14. *Recommendation.*—Although we are very loathe to do so, there appears no other alternative than to recommend award for all four schedules to the low bidder, the Frazier-Davis Construction Company, 1319 Macklind Avenue, St. Louis, Mo., provided subsequent investigation discloses the company to be fully responsible to undertake and complete the work.

* * * * *

After a thorough investigation of plaintiff's experience, its organization and financial standing by the Chief Engineer and Commissioner of the Bureau of Reclamation and the office of the Secretary of the Interior, the recommendation of award of the contract to plaintiff by the Board of Engineers was approved. The contract which during this

investigation had been signed by plaintiff was thereupon signed by the defendant. Defendant's Board of Engineers, in stating in the recommendation that plaintiff's bid be accepted, that "Under the necessity of obtaining this labor from relief rolls with the probability that it will be of less than average efficiency, the low bidder's situation will become a difficult one and a serious loss on the contract can be expected" had reference to the average efficiency of experienced construction labor ordinarily selected and used on construction projects, and the Board was only expressing an opinion based on its consideration of the specific provisions of the contract and specifications and the general observations available to everyone that on the whole relief labor, especially in an agricultural area, was ordinarily of less than average efficiency when compared to nonrelief labor experienced in construction work and ordinarily selected and used on construction work by contractors in industrial areas. Such conclusion of the Board was not based upon any facts or information peculiarly within the knowledge of the Board or any of its members and not known to bidders generally.

The Chief Engineer, who was also the contracting officer, concurred in the recommendation of the Board of Engineers that the contract be awarded to plaintiff, and recommended such award to the Commissioner of the Bureau of Reclamation. Thereupon an investigation was had by the Bureau by direction of the head of the Interior Department of the construction experience and financial ability of plaintiff to perform the work. Plaintiff was asked for a statement of its experience. That was furnished with a reference to other government contracts which plaintiff had performed.

No bidder was informed by defendant and none of them had knowledge of the estimates made by the Chief Engineer and engineer Bloodgood, as set forth in the report of the Board of Engineers dated November 25, 1935, until testimony was being taken in this case before the commissioner of the court. No representative of plaintiff was present at the opening of bids, but on November 25, the day bids were opened plaintiff was informed by defendant's construction

engineer Williams that its bid was pretty low. That information did not cause plaintiff concern.

6. The four bids next above plaintiff's bid of unit prices amounting to $489,527.50 for the estimated quantities set forth on the bid form were, first, $524,285.50; second, $636,-709.50; third, $696,590, and fourth, $771,020.50. Seven bids were submitted.

On January 6, 1936, before defendant had signed the contract involved herein and before notice to proceed had been given plaintiff, H. R. McBirney, defendant's senior engineer, All-American Canal Project, while on an inspection tour, had a conference with plaintiff's officials at Yuma, Arizona, and made a report thereof to the Chief Engineer, defendant's contracting officer, as follows:

> At the time I was in Yuma [January 6, 1936] there was yet some uncertainty as to whether contract was to be awarded for the wash structure work to the Frazier-Davis Construction Company. However, two representatives of that company and the representative of a form contracting company were in Yuma and discussed their plans in considerable detail with the construction engineer, Mr. Bloodgood, and me. They stated definitely that they propose to construct the 120 wash crossing structure first and the 424 structure next or somewhat concurrently. It is apparent that the contractors are somewhat worried over their extremely low bid, and for this reason are going to want every possible concession as regards construction procedure and equipment. They were primarily interested in the type of forms that could be used on this work. They proposed the use of a very carefully designed steel form, but its adoption for this work depended upon the length of time that it would be necessary to leave such forms in place. They would like to have been granted permission to remove such inside forms within two or possibly three days at the outside. They were advised that such permission could not be granted but that there was a possibility that a period of time for removal of forms somewhat less than ordinarily contemplated, might be granted in this case, consideration being given to the strength developed in the concrete after a certain minimum period of time. They also requested permission to vary the procedure of pouring the large structures, beginning at the center and working outward, as very defi-

nitely provided in the specifications. They were told very positively that permission to vary from the procedure outlined in this respect would not be granted. They based their claim for permission to vary in this respect from the specifications, on the statement in the specifications that variations from the plan could only be granted by written permission from the contracting officer. They claimed that their bid was made on the basis of assuming that such permission would doubtless be granted. I was rather impressed with the representatives of the contractor but it is apparent that they will make requests for many concessions in an attempt to complete the work within their bid.

7. By letter of January 20, 1936, the Construction Engineer gave plaintiff notice to proceed with the work. Plaintiff acknowledged receipt of the notice to proceed on January 23, 1936. The contract called for completion within 600 days of the notice to proceed, and the date of completion was, therefore, fixed as September 14, 1937.

R. B. Williams, who gave plaintiff notice to proceed, was the authorized representative of the contracting officer as construction engineer in immediate charge of plaintiff's contract work until July 1937, when L. B. Foster became the construction engineer and representative of the contracting officer.

8. The four wash siphon structures to be erected, as contemplated by the contract, called for excavation and concrete work at four locations along the All-American Canal, designated as 120 Wash, 424 Wash, Unnamed Wash and Picacho Wash, the sites being several miles apart. These structures consisted of heavily reinforced concrete with slab floors and a multiple barrel culvert through which the water of the All-American Canal was to flow. The top of the culvert was designed as a bridge to carry flood waters, accumulated in flash storms, at right angles across the top of the canal. In addition there were bridges both across the canal and parallel to the canal. Said structures were substantially similar at each site except as to their length along the canal. Because of the hydraulic nature of the structures which involved varying stresses at different points, all of the concrete was heavily reinforced according to a definite pattern set forth in the

specifications and drawings. Many of the sections of the structures were similar to each other and operations thereon could be repeated, using certain of the wooden forms many times. Other parts of the form work were incapable of multiple use as a practical matter on account of difficulty in removal of the forms. A detailed description of the structures involved will be found in the several detailed drawings as a part of the specifications and in a series of photographs in evidence as plaintiff's exhibit No. 30, and defendant's exhibits Nos. B-1, J, S, T, and U, which are made part hereof by reference.

9. Before making its estimate preparatory to submitting a bid for the work under the contract, Mr. Frazier and Mr. Wyatt, plaintiff's president and vice president, respectively, spent two weeks or longer at Yuma, Arizona, visited the site of the proposed project, and rode over the general area. Plaintiff had knowledge that the location of the site of the work was a desert section; that the country adjacent thereto was agricultural and not industrial; also that the specifications provided that 90% of its labor would be drawn from relief rolls.

Plaintiff based its estimate on its own interpretation that, under the contract, the defendant agreed to furnish a sufficient number of average, experienced, efficient workmen, competent to perform each operation of the contract work in the estimated number of hours within which experienced and competent men could carry it out—such workmen as plaintiff had been accustomed to using from relief rolls on various contracts in other parts of the country.

Plaintiff gave no consideration to and made no investigation of the conditions relating to labor in the general area of the project from which its labor was to be drawn, nor to the character of the workmen it was likely to obtain in that area. Plaintiff assumed that defendant would furnish it sufficient qualified and efficient labor when and as needed on the work.

Plaintiff also expected that considering the desert location of the project the work would be required to be good and substantial, but that certain of the requirements of the specifications, such as that relating to fine finish, would not be

rigidly insisted upon. For instance, smooth steel trowel finish on exposed surfaces of concrete not finished against forms, such as horizontal or sloping surfaces, plaintiff deemed unnecessary on this project and more costly, although paragraph 72 of the specifications required such a finish. Plaintiff regarded the site of the project as ideal for carrying on the work, in that it would be unnecessary to heat concrete, there being no frost, and no mud from excessive rains.

At the time of making its bid plaintiff was aware that defendant intended to construct other large projects in the vicinity, including Imperial Dam, which would also require labor to be drawn from relief rolls. Plaintiff had bid on the construction of the Imperial Dam, the largest of such construction projects, and was a regular recipient of invitations to bid issued by the Bureau of Reclamation.

10. The specifications provided that no concrete could be placed during the period from June 1 to September 30, inclusive, each year. Plaintiff formulated a plan for the performance of the contract, which contemplated the construction of the two smaller structures at 120 Wash and 424 Wash, to be carried on practically simultaneously, commencing in the spring of 1936, to be completed by June 1, 1936; then from October 1, 1936 to June 1, 1937, to build the two larger structures, composing about 70% of the work. In the spring of 1936 one superintendent was contemplated for the work on the first two structures, and the shifting of men and equipment back and forth between the two structures 120 Wash and 424 Wash, they being within 4 or 5 miles of each other. Plaintiff also planned to work 5 days a week, 8 hours per day, using one shift of men except on excavation where three shifts would be used if necessary.

Plaintiff's plan of operation was made known to the defendant.

11. The Works Progress Administration, pursuant to Art. 19 of the contract, designated the National Reemployment Service (hereafter referred to as N. R. S.), at El Centro, California, which is approximately 60 miles from the situs of plaintiff's work, as the source of supply for plaintiff's labor. This was in accordance with established custom

under W. P. A. contracts and was for the reason that the project covered by plaintiff's contract was located entirely in California and financed, in part, by the 5th district, including Imperial County, in which El Centro is located, and Riverside and San Bernardino Counties. There was also a N. R. S. office established at Yuma, Arizona, which was approximately 10 miles from a portion of plaintiff's project, but this office handled Arizona relief labor and not California relief labor.

On account of the distance between El Centro and the project the N. R. S. had a representative in the vicinity of the Imperial Dam or general project who contacted plaintiff's representatives once or twice a week for the purpose of facilitating the referral of labor for plaintiff's project.

12. All applicants for work at plaintiff's project were required to register with the N. R. S. at El Centro, although on some occasions such registration was made at the branch N. R. S. office at Imperial Dam. The El Centro office of N. R. S. also had upon it the duty of referring labor to certain other projects being carried on concurrently along the All-American Canal.

The All-American Canal lay entirely within the limits of the State of California, and all of plaintiff's work which was on the Canal was within the confines of that State. The All-American Canal system, Boulder Canyon Project, covered the States of Arizona, California, and Nevada, but none of the work in connection with the Canal itself lay in Arizona or Nevada.

The N. R. S. office at El Centro had an adequate establishment with capable manager and assistants to carry on the work it was assigned to do.

Men from all over the United States came to this area looking for work and voluntarily registered with the N. R. S. at El Centro. In registering applicants for work the N. R. S. ascertained the qualifications of the men by questioning them as to past work history, preference in work, age, etc., and evaluated the applicants as they were interviewed. No trade test was made.

The N. R. S. did not assume to warrant the qualifications of the men referred but informed the contractor that it must

judge as to the qualifications of the men referred. A contractor hired, laid off, and discharged men according to its judgment and will.

The N. R. S. did not have applicants examined physically for fitness, and plaintiff employed a physician at El Centro to examine all workmen referred to its project, so as to insure physically competent men on the work.

13. The N. R. S. furnished plaintiff with blank forms (401), on which to requisition labor in the classification desired. In the beginning, upon receipt of plaintiff's requisitions, N. R. S. would give the applicant six duplicate assignment forms to take to plaintiff. Under this plan plaintiff would endorse thereon whether or not the applicant was employed and return the forms to N. R. S. During March it was learned that some of the men referred to plaintiff and to other contractors in the vicinity were not reporting to the projects. Thereupon the N. R. S. by letter of March 21, 1936, gave plaintiff notice of change in procedure. Thereafter the applicant was given one assignment form and the other five were mailed directly to plaintiff, one of which was to be returned to N. R. S. appropriately endorsed and the balance distributed according to the regulations.

14. In referring men to contractors local labor within the 5th district was given preference until the local reservoir diminished, when men from without the 5th district area were referred.

Approximately 3% of the skilled labor furnished plaintiff came from Imperial Valley, which was an agricultural and not an industrial section. The remainder of skilled labor came from other parts of the state and from other states of the union. Approximately 60% of the common labor furnished plaintiff was drawn from the local area during the first period from January to June 1936. During the following season approximately 20% of the common labor came from the local area.

In the early part of the program the N. R. S. held rigidly to the requirement that 90% of the unskilled labor come from relief rolls. Later, in order to facilitate referral of men when there was pressing need, at times, the Manager of

N. R. S. disregarded this requirement and referred men who were not on relief.

In the spring of 1937 plaintiff requested that it be furnished union labor, and N. R. S. complied with this request.

15. On February 10, 1936, the manager of N. R. S. wrote plaintiff's superintendent as follows:

> I would appreciate it if in the future, especially when the time comes for you to be needing men, that you forward Requisition #401 to this office at least six days in advance, stating the numbers of men you may be needing and the classifications desired.

This request was not intended as a requirement and plaintiff so understood, but was made in the interest of better service, because the men comprising the reservoir of registered labor were scattered, and time was required to get them together. This request was never made mandatory. It was never enforced against plaintiff, and N. R. S. referred men to plaintiff without regard to this request.

16. Plaintiff's first work under the contract in January 1936, and up to the first part of March 1936, consisting in the main of excavation, proceeded in a satisfactory manner and substantially according to schedule. The greater proportion of workmen needed up to this time was skilled operators of equipment, furnished from plaintiff's organization, and a small amount of common labor.

Plaintiff had sufficient and efficient workmen of the classifications desired up to approximately March 5th or 6th, 1936, and suffered no excess costs up to this time.

17. Beginning early in March 1936, its excavation work having been completed, plaintiff commenced preparing for concrete operations. The building of forms for concrete piling commenced March 6, 1936; the bending of steel for piling commenced approximately March 11th. Plaintiff was unable to pour concrete until the mixing plant was completed and the forms ready. The mixing plant which had been delivered knocked down at the site February 5th had to be erected and was completed just prior to March 22nd. The cause of delay in erection of the mixer is not satisfactorily shown.

Concrete operations commenced about March 22, 1936, and this work progressed until June 1, 1936, after which date and until October 1, 1936, as provided in the specifications, plaintiff was not permitted to pour concrete on account of the heat at that season of the year.

In order for plaintiff to carry out its plan for completing 120 Wash and 424 Wash by June 1, 1936, it would have been necessary for plaintiff to have started pouring concrete about February 20, 1936. In order to have so completed the work at the two washes, it would have been necessary to have driven concrete piling at 424 Wash on or about March 1, 1936.

Under the provisions of the specifications the concrete piling had to be cured for twenty-eight days before it could be driven and plaintiff did not have piling ready to be driven prior to April 14, 1936.

It would have been impossible to place any of the concrete structure at 424 Wash other than the floor slabs and the division walls on the floor slabs in the center until the concrete piling was driven. On May 4, 1936, plaintiff commenced driving its concrete piling at 424 Wash.

18. Plaintiff contends that it was delayed in beginning concrete operations because of defendant's failure to deliver required steel. The record does not disclose that a claim was made for delay in delivery of steel during the contract period, and plaintiff's petition contains no allegation pertinent thereto. The claim was first advanced during the taking of testimony in the case.

Three carloads of steel to be used on 120 Wash were on the ground at the time plaintiff was ready for its use, and it is not shown that plaintiff was delayed by the defendant in respect to the delivery of steel.

19. Shortly after it began to requisition labor, plaintiff complained orally that men were not reporting for work promptly, as needed to carry on the work in an orderly manner; that many of the men reporting were not efficient in form work, steel work, and concrete work; that the common labor was slow and inefficient; and that, for this reason, plaintiff had difficulty in carrying on the work and was caused delay.

Under date of March 6, 1936, the superintendent, in a letter to the manager of N. R. S. stated:

> We are badly in need of the carpenters, including the man for the saw mill. We are also in need of the laborers, all of which we have ordered. I was wondering if we are negligent in any way in giving you the proper information and the help which you need in supplying us men.

The man for the saw mill was ordered March 2nd.

Prior to this date (March 6, 1936) plaintiff's written communications made no complaints, but comprised requests for employment of named men in various skilled classifications, practically all of which were granted.

20. Again under date of March 14, 1936, plaintiff's superintendent wrote to the construction engineer as follows:

> We hand you herewith a report with reference to the labor conditions on our contract for building 4 Wash Siphon Structures.
>
> These men were ordered by requisition through the National Reemployment Service, El Centro, California. You will note the dates requisitions were issued and the dates the men arrived.
>
> We find it is going to be very difficult to anticipate our labor requirements six days in advance on account of our contract being divided into 4 separate units which are several miles apart; also, the type of construction.
>
> * * * * *
>
> When men do not arrive on schedule, it seriously retards the work, also adding additional expense. If delays continue, due to labor shortage, it will be impossible to complete the 4 structures in the allotted time. Therefore, we request that the advance notice of 6 days from the date of a requisition for men be shortened on our project.

21. Under date of March 16, 1936, plaintiff's superintendent wrote the construction engineer complaining that two steel placers and one helper who had been furnished were inexperienced, with no improvement shown after 5 days' work, and it was necessary to lay them off; that on March 9, eight laborers were ordered, but up to March 16th none had reported. The closing paragraph of this letter is as follows:

It is very evident that the National Reemployment Service are not able to supply our labor wants. Therefore, we ask that we be granted permission to employ men from other sources.

This letter was delivered in person by plaintiff's superintendent and the labor situation was discussed by him and defendant's construction engineer, who orally advised plaintiff's superintendent that he knew of no provisions of the contract that would allow him to grant the request of plaintiff. Plaintiff's superintendent was informed, however, by defendant's construction engineer that though defendant could not grant plaintiff permission to employ its own men, the N. R. S. office in El Centro was clearing men when there were no available skilled workers on the relief rolls, and that any skilled workers whom plaintiff had in mind to hire could be cleared through the N. R. S. office at El Centro. This practice was followed.

22. Under date of March 20, 1936, the manager of N. R. S. wrote plaintiff's superintendent as follows:

I am sorry to hear that assignments of men to your job have not proven as satisfactory as we had all hoped. The many ramifications of this program is proving confusing, not only to the contractors themselves, but also to the employment offices. Dealing with these relief men and the rules and regulations as they pertain to exemptions, has proven so far to be a headache.

Part of my staff has been quarantined with scarlet fever; however, they will all be back on the job Monday which will give me a chance to again make visits to the various jobs. I particularly want to see you in the hope that we can adjust and have a better understanding of the many mistakes and difficulties which we are now confronted with. I expect to be on the job Tuesday.

23. At times during March and part of April 1936, it was necessary for N. R. S. to call labor from without the 5th district area, which required additional time. During this period, while most of plaintiff's several requisitions were filled 100%, there were many occasions when a requisition was filled only 65% or 75% or 90%, with a delay of 3 or 4 days to a week, and even longer, before the requisition could be completely filled. On those occasions when a requisition

was not filled before a delay of three or four days to a week, such delay was not the fault of defendant but was caused by plaintiff's failure properly to anticipate its labor needs and to the fact that the N. R. S. office in El Centro had to go out to greater and greater distances in order to find men to refer to plaintiff, and to the fact that some men referred by N. R. S. failed to report to plaintiff.

The character of work provided by the specifications required employment of men of reasonably high degree of skill. It was important that the work be coordinated so that men after performing a particular operation at one place should move to the next point and perform the same operation, while a succeeding crew would go to the first point and perform the next operation in sequence, thus insuring continuous work of the same kind for each crew, and harmonious progress of the work on the project.

Failure to have sufficient skilled and unskilled workmen at the moment needed for various operations, especially in March and part of April, due largely to plaintiff's failure to timely requisition a sufficient supply of men, prevented plaintiff from properly organizing its work. A given crew had to be assigned to various operations and the work could not be carried on in logical sequence, which resulted in serious delay. During the month of April 1936 plaintiff had its force organized and was endeavoring to carry on the various operations in proper sequence, but shortage of workmen continued, and by May the men had become but little more efficient and skilled than during March. A comparison of plaintiff's pay rolls and requisitions discloses that there was no unreasonable delay on the part of the defendant but on the contrary that the requisitions for workmen were filled within the space of a few days and as promptly as could be expected under the circumstances.

24. During the progress of the work in March, April, and May 1936, there were occasions when labor was slow in reporting for work and plaintiff continued to complain orally to the representative of the contracting officer on the project and also to the manager of N. R. S. that labor was not reporting promptly and that the men were inefficient. Both of those representatives of the defendant

endeavored to expedite the sending of men to plaintiff's project.

25. Plaintiff requisitioned men from the N. R. S. by letters, memoranda, telephone calls (presumably confirmed by formal requisition), and by the formal "requisitions" (No. 401). The manner and method of the requisitions, the list of "referrals" by the N. R. S. as disclosed in plaintiff's list, exhibit 32, and plaintiff's payrolls are irreconcilable as showing the exact number of men requisitioned and referred to plaintiff. This discrepancy is not satisfactorily explained in the evidence. However, an analysis of the formal "Requisitions," "Referral List," and "Payroll," in evidence as plaintiff's exhibits Nos. 34 and 32, and defendant's exhibit "Q," respectively, and made part hereof by reference, for the period from January 1 to June 1, 1936, discloses the following:

Skilled carpenters.—Between the commencement of the work and the end of June 1936, plaintiff requisitioned thirty-two skilled carpenters. The first of these requisitions is dated February 23, 1936 and calls for two men who were supposed to "report about the middle of the week." These two men did report about February 29, 1936. The next requisition for carpenters was March 13, one skilled carpenter; March 14, one skilled carpenter; March 15, six skilled carpenters; March 23, two skilled carpenters; March 27, one skilled carpenter.

The next requisition for skilled carpenters is dated April 11, 1936, when four carpenters were requisitioned. On April 18, six were requisitioned, and on April 27, nine.

The payrolls show that sixty different individuals were employed by plaintiff during said period as skilled carpenters. During the week ending February 29, 1936, two men had been requisitioned and there were two men on the payroll. During the week ending March 14, 1936, the date of the next requisition, three men had been requisitioned and the names of eight different carpenters appeared on the payroll by that week-end. During the week ending March 21, 1936, ten men had been requisitioned to date and eleven men were on the payroll. During the week ending March

28, 1936, thirteen skilled carpenters had been requisitioned to date, whereas twenty-three of them had appeared on the payroll, and by the week ending April 4, 1936, twenty-five skilled carpenters' names had appeared on the payroll. During the week ending April 25, 1936, plaintiff had requisitioned to date only twenty-three skilled carpenters, and by that time the names of forty-seven skilled carpenters had appeared on the payroll. For the week ending the second day of May, the date of the last requisition for skilled carpenters, during the first season, the total number of requisitions was thirty-one, and up to that same date the names of fifty-six skilled carpenters had appeared on the payroll, fifty-nine by May 16, and sixty by May 23, 1936.

Steel Placers.—During March, April, and May, plaintiff requisitioned twenty-six steel placers, and during that period had on its payroll the names of twenty-six different men in that category. They were promptly supplied.

Laborers.—Plaintiff requisitioned between January 1 and June 1, one hundred forty-six laborers and had upon its payrolls, one hundred forty-nine laborers, although one hundred sixty-two laborers had been referred to plaintiff by N. R. S.

During January and February of 1936, N. R. S. referred as many laborers as had been requisitioned. During March it referred fifty-nine laborers, although only twenty-eight had been requisitioned and fifty-four new laborers were added to the payroll in that month, making an excess of thirty-one over the number theretofore referred. In April, plaintiff requisitioned sixty-six laborers and forty-two were referred; thirty-nine new names appeared on the payroll, an excess of referrals over requisitions to the end of April of seven. During the month of May, 1936, twenty laborers were requisitioned. Twenty-nine were referred and twenty-six new men were put on the payroll showing that to the end of May there was an excess of referrals over requisitions of twenty men. Actually three more men appeared on the payroll than had been requisitioned.

26. In May and also in June of 1936, about the date when plaintiff was closing down the work for the summer, a representative of plaintiff and Mr. Williams, the representative

of the contracting officer, had conferences about the slow progress of the work. Plaintiff's representative orally stated to Mr. Williams that plaintiff would probably make a change in its organization during the following season; also that plaintiff might have to ask for an extension of time for completion of the contract on account of delays resulting from failure to receive sufficient labor, which plaintiff contended was the fault of the defendant. Plaintiff did not, however, make application at any time, either orally or in writing, for an extension of time.

27. Instead of completing the structures at 120 Wash and 424 Wash during the spring period ending June 1, 1936, plaintiff completed but a small portion of the concrete work at 120 Wash and none at 424 Wash by the first of June 1936. Plaintiff, under its planned schedule contemplated completion of about 30% of the entire contract work by this date, but actually finished approximately 15% of the two structures or approximately 5% of the entire contract work by June 1, 1936.

Because of the delay in meeting the anticipated schedule during the spring period of 1936, for which delay the proof fails to show the defendant was responsible, plaintiff entirely changed its planned schedule for the period beginning October 1, and decided to work on all four structures at the same time, using three shifts of men instead of one shift per day. The proof is not sufficient to show to what extent, if any, the use of three shifts a day instead of one increased the cost of performing the entire contract over what such performance would otherwise have cost. The use of three shifts resulted in the work being completed on time.

28. In preparation for the second season, plaintiff commenced organizing its crews during August 1936, and was permitted to pour concrete in September, although the specifications provided that no concrete should be poured prior to October 1, so that when October 1st came plaintiff was proceeding with the work using two day superintendents and a night superintendent, working 7 days a week, 3 shifts on certain operations, and working on the structures at all four sites.

During the second season plaintiff received labor more plentifully; crews were properly organized; and the work progressed with greater precision. Nevertheless there were occasional shortages of labor and plaintiff continued to complain orally to defendant's representatives in regard to shortages and inefficiency of labor.

29. Under date of November 30, 1936, plaintiff wrote the defendant, addressing the letter to Yuma, Arizona, as follows:

> We have written before and also verbally discussed the difficulties of securing, through the National Reemployment Agency, sufficient labor, both skilled and unskilled, to properly conduct our contract for the Wash Siphon Structures of the All-American Canal. Not only has there been delay in furnishing us men, but a large percentage of the men furnished us have not been qualified to do the work necessary under our contract. As you know, for the class of work required on our contract, workmen of a reasonable amount of skill are required, the structure being composed of thin concrete walls heavily reinforced. As you know, carpenters and reinforcement steel placers were not exempted from the provisions of Article 19 of the contract by Article 19 of the specifications. Consequently, it was not until the resumption of our work this fall that the National Reemployment Service waived the requirements of these two classes of labor coming from relief rolls.
>
> On March 14, 1936, and March 16, 1936, we wrote you calling this matter to your attention and requesting permission to obtain these men from other sources. This permission was not granted, and we suffered a considerable delay all last spring for this reason. Further, since resuming work this fall, we have been delayed through failure of the National Reemployment Service to furnish us common labor as requested. Also, the labor furnished is incompetent, and as a result we are continuing to have excessive costs and delays due to the fact that the labor furnished cannot do the work for which they are assigned.
>
> We know that you have knowledge of these facts and write you at this time to let you know that we not only have had, but are continuing to have, delays and excessive costs.

> Also, we will probably continue to have some unless permission is granted us to employ our own labor. As these delays and excess costs are still continuing and cannot be determined at this time, we will defer presenting our claim until such time as we are able to ascertain the extent of same.

May 8, 1937, plaintiff again wrote the representative of the contracting officer, in which it stated:

> As we have notified you before, we have had and are continuing to have delays due to the inability of the National Reemployment Service to furnish us with sufficient skilled and unskilled labor, on our contract for the construction of wash siphon structures on the All-American Canal project.
>
> * * * * *
>
> As a consequence of the above delays our progress has been delayed to a point where it seems questionable whether or not we will be able to complete the placing of concrete at Unnamed and Picacho Washes prior to June 1st, 1937.
>
> For the past two weeks we have been endeavoring since April 21st, to get carpenters to increase our forces so as to complete on time. We have received only about sufficient carpenters to maintain the number at work two weeks ago. We are making every endeavor to get additional men, even calling on the labor organizations at San Diego and Los Angeles for them.
>
> * * * * *
>
> As you know, we are suffering a tremendous loss on this contract. Also, we believe you will agree that we have made every effort and spared no expense to complete our contract on time. However, due to causes beyond our control we may not be able to do so, and we earnestly regret [request] that we be allowed to continue concreting operations beyond June 1st until we have completed same.
>
> We shall make every endeavor to complete by June 1st or as near thereafter as possible and will maintain as large a working force as we can obtain throughout the remaining construction period.
>
> Since we must soon make a decision as to whether to concentrate on Unnamed Wash and complete same or continue operations so as oultined above, your early decision is requested.

Plaintiff was given permission by defendant to place concrete after June 1, 1937. Other than the above quoted let-

ters plaintiff made no further protest and took no further action in regard to these matters at the time.

30. Plaintiff's labor supply was augmented during the progress of the entire contract work by employment of men whom it requested to be registered by N. R. S., some of whom were from plaintiff's organization. Of 181 requests so made there were referred at least 105 men. Plaintiff also promoted from a lower to a higher classification a number of men whom it had trained.

31. After August 1, 1936, the crews on the various operations became progressively more efficient, the work proceeding on the structures at all four sites simultaneously under efficient superintendence, and progressed in normal manner to the end of the contract. During the latter part of the work plaintiff accomplished parts of the work within its original estimated cost and on some items made a profit.

The work on the entire project was successfully completed within the time specified in the contract and plaintiff was not assessed liquidated damages.

32. Plaintiff did not have adequate housing and boarding facilities of its own for workmen at 120 and 424 Washes. The distance from El Centro, California to plaintiff's project, approximately 60 miles, made it impracticable for men referred to the project from that area to travel to and from work each day. Plaintiff had an arrangement with a neighboring contractor who had housing and boarding facilities, whereby plaintiff's men would be taken care of in that camp at a certain price per month. Most of plaintiff's workmen were taken care of in this manner during the operations at 120 and 424 Washes. Other men preferred not to go to that camp so plaintiff's superintendent put up some tents for them near the project. At Unnamed and Picacho Washes plaintiff had made provision for its men.

The short period of time covering plaintiff's contract, in comparison with some of the larger projects covering a longer period, caused work on plaintiff's project to be less attractive to workmen than work on other projects. This tended to cause a shortage of labor going to plaintiff's project, but there is no proof as to the number of men so affected.

33. The manager of N. R. S. made all reasonable endeavors to refer qualified men to plaintiff's project in accordance with its requisitions.

34. Plaintiff complains that the defendant's inspection of the work as it proceeded was too rigid. Defendant's representatives on the project rigidly inspected the work as it proceeded, but the inspection was reasonable and within the requirements of the specifications.

35. During the progress of the work there were many delays, some material and some immaterial, such as are incident to carrying out any large construction project. Some were caused by the shortage of labor at the moment needed, by labor inexperienced in heavy construction work, and also by inefficient supervision on plaintiff's part. These delays were the cause of materially increased cost in an undetermined amount.

36. Plaintiff's measure and evaluation of the efficiency of skilled labor that it expected to receive from the N. R. S. were as follows:

> *Skilled carpenter.*—A man with six years, or longer, experience as a carpenter and apprentice. He should be capable of laying out work, of reading a simple blueprint, directing the work of one or two rough carpenters or helpers.
>
> *Rough carpenters.*—A man with from three to five years' experience as a carpenter or apprentice. He should be mechanically perfect, i. e., measure and cut a board accurately and squarely, assemble lumber into forms in a quick and workmanlike manner; should be sufficiently skilled to level and plumb forms, although not capable of reading a blueprint or laying out work.
>
> *Carpenter helpers.*—An apprentice learning the trade with up to three years' experience, should have had one of these years as a laborer with carpenters. He should be capable of nailing, bracing, assisting a carpenter or rough carpenter, occasionally using a saw, hammer and square.
>
> *Laborer.*—A man physically able to do heavy, hard work, such as using a shovel, wheelbarrow, concrete buggy, carry cement, steel, lumber, etc. He should be capable of understanding simple instructions given by his foreman. Should be able in a week's time to tell the difference in lumber between a 2 x 4, 2 x 6, 2 x 8, etc., if assigned to work with a carpenter gang. If assigned

to a steel gang, he should be able to tell the difference between various diameters of steel. If assigned to a labor gang, subgrading, he should, when given a measuring stick and guide string, be able to tell whether he has dug to grade immediately under the string.

37. Plaintiff received an *adequate number* of workmen of the respective classifications desired, in accordance with its requisitions, during the entire contractual period. The men reported within 1 to 2 days from the time *they were referred* to the project, which was a reasonable time. However, in many instances there was delay of more than two days in reporting by men between the *date of plaintiff's requisitions* and the *date of referral*, particularly during March and the early part of April 1936 and during November 1936. This was largely due to the fact that men had to be called from without the local area. It is not shown that this delayed the work as a whole.

Plaintiff contributed to this delay by failure to properly anticipate its labor requirements in advance of its actual need of the men. In nearly all instances plaintiff made requests for the various classifications of workmen to be sent "immediately," "at once," "now," "in a day or two." Only in a few instances did plaintiff request men to report at a date several days or a week subsequent to the requisition.

38. While plaintiff received many workmen who were skilled in heavy construction work, a considerable number of men received from N. R. S. did not meet plaintiff's requirements and were not trained heavy construction workmen as that term is understood in the engineering and contracting professions.

The men had all passed a physical examination by plaintiff's physician and were physically capable of doing the work required. In the skilled and semiskilled classes the men were of average intelligence, including an indefinite number of the common laborers. Some of the common laborers were Mexicans and spoke broken English, which handicapped them to some extent. There were a few men who loafed on the job.

There is no satisfactory proof as to the proportion of labor skilled in heavy construction work referred to plaintiff and the unskilled and untrained labor that plaintiff received.

39. Plaintiff groups its contract work under ten items, as follows:

1. *Various Items of Excavation.*
2. *Compacted Embankment.*
3. *Backfill Around Structures.*
4. *Tamped or Puddled Backfill.*
5. *Concrete in Structures & Floor Slabs.*
6. *Placing Reinforcing Bars and Side Wall Expansion Joints.*
7. *Dry Rock Paving and Rip Rap Paving.*
8. *Driving Steel Sheet Piling.*
9. *Miscellaneous Contract Items.*
10. *Manufacture and Drive Concrete Piling.*

(Reference is made to plaintiff's exhibit No. 31, page 3, in evidence and made part hereof by reference.)

Plaintiff states that in Items Nos. 1, 3, 4, 7, 8, and 9 it made a profit; that these items comprise work much of which was performed by workmen not furnished by the N. R. S., and are not included in the claim.

As to Items Nos. 2 and 10, plaintiff states that it is not possible to determine its loss, since all of the work was not performed by labor furnished by the N. R. S., but by inefficient labor and contributing causes. These items are excluded from the claim.

Hence, plaintiff's claim in this action embraces amounts claimed for increased cost on Items 5 and 6 as follows:

5. *Concrete in Structures & Floor Slabs*		$318, 597. 21
6. *Placing Reinforcing Bars and Side Wall Expansion Joints*		23, 152. 32
Adding:		
General Expense, including:		
Superintendence	$2, 405. 44	
Loss on Employees' Board	1, 449. 30	
Road between 424 Wash & Unnamed Wash	4, 644. 48	
Medical examinations	1, 788. 00	
		10, 287. 22
Estimated proportionate Home Office Expense		11, 688. 97
Loss of original profit on contract items		36, 940. 78
		400, 666. 50

40. Plaintiff has included as excess costs, as shown in finding No. 39, the following:

Superintendence.—Plaintiff completed the contract work within its time limit. While there was proof of inadequacy of superintendence during the first period, January to June 1936, the total cost of superintendence covering the entire contract is not shown to be excessive or unusual for the normal work under the contract.

Loss on Employees' Board.—Plaintiff adds $1,449.30 for employees' board, because certain workmen referred by N. R. S. to plaintiff's project failed to report to plaintiff for work, but did obtain board from the place designated by plaintiff for its men to receive accommodations. The defendant was in no way at fault in this matter. Plaintiff had under its own control arrangements for work and for board of its employees.

Road between 424 Wash & Unnamed Wash.—Plaintiff adds to its excess costs $4,644.48 for building of a road between 424 and Unnamed Washes. According to specification No. 28, page 20, the duty was upon the contractor to provide roads, and the defendant disclaimed responsibility therefor.

Medical examination.—The defendant, under its rules and regulations, was not authorized to furnish medical examinations to the applicants for work. Plaintiff voluntarily employed a physician for the purpose and paid him.

Estimated proportion Home Office Expense.—The home office expense incurred by plaintiff is based upon an estimate, the proof of which is not satisfactorily established, even if such item should be held properly chargeable as excess costs under the findings in this case.

Loss of original profit on contract items.—This item of $36,940.78 is not a part of excess costs.

The foregoing items amount to the sum of $58,916.97 and are not properly a part of excess costs incurred as a result of insufficient and inefficient labor.

41. Plaintiff computed its *claimed excess costs* by subtracting from the actual costs incurred in the performance of the work, its *original estimate*, which it contends was fair and reasonable.

As set forth in detail in finding No. 9, *supra*, plaintiff based its original estimate upon its experience in other parts of the United States where labor conditions were entirely different, and failed to give consideration to labor and climatic conditions in the area where the contract was to be performed. (See finding No. 9.)

In its calculations plaintiff undertakes to separate those items of the contract alleged to be wholly due to inefficient and insufficient labor from those items on which it made a profit, and also those from which it had a loss partially caused by inefficient labor and partially by other causes. Inasmuch as the entire work of the contract progressed contemporaneously and was intercorrelated, with operations more or less dependent on each other, it is not possible to determine accurately the amounts due to one or the other cause.

42. Plaintiff did sustain excess costs over its bid of about $362,136.55 on the concrete and steel work in carrying out its contract. This excess cost resulted from a number of factors in addition to the use of relief labor. Plaintiff suffered no excess costs from inefficient and insufficient labor in January and February 1936 (Finding No. 16). From August 1, 1936, to the end of the contract, workmen became progressively more efficient, so that during the latter part of the contract plaintiff was performing the work within the limits of its original estimate (Finding No. 31). Plaintiff contributed materially to the delays in securing labor as needed (Finding No. 37). The proof does not establish that defendant breached any provision of the contract by failing to refer to plaintiff through the N. R. S. sufficient skilled and unskilled labor as contemplated by the contract, nor does the proof establish that defendant breached the contract by supplying labor from relief rolls as requested by plaintiff which was less efficient and qualified than the labor which the provisions of the contract and specifications contemplated would be available and supplied from such relief rolls as promptly as possible under the circumstances obtaining and under the regulations of the Works Progress Administration.

Under the contract the defendant did not guarantee the qualification and efficiency of the relief labor to be supplied under the contract, and plaintiff was free to accept or reject

the men referred on plaintiff's requisitions, or to dismiss them after they had been employed and tried. Defendant's only source of information as to the qualification of the men referred was from the men themselves. Plaintiff knew all of this when it made its bid.

While some of the men referred by the National Reemployment Service were found not to be good workmen, the general quality of the skilled labor on the project was better than average relief labor and better than plaintiff should have expected to obtain in that area on the basis of securing 90% of the labor employed on the project from relief rolls as required by Article 19 (a) of the contract. The unskilled labor which the N. R. S. referred on plaintiff's requisitions was not experienced construction labor, and plaintiff knew or should have known, when it made its bid that that would be the case in that area; however, the men supplied by the N. R. S. did put forth on the average a good day's work, and under proper supervision were able to carry out the work required of them. They became more experienced and capable each day they worked. Some of the unskilled laborers were promoted by plaintiff to semiskilled and skilled jobs as the work progressed. The quality and efficiency of the unskilled labor supplied by defendant for use on the job as disclosed by the evidence as a whole, were as good as plaintiff, when making its bid, should have expected, knowing that the labor would be drawn from relief rolls in nonindustrial communities.

It is not possible from the proof to determine with reasonable accuracy the amount of plaintiff's excess costs of performance over its estimated costs for labor due to its failure to receive an adequate supply of labor as promptly as plaintiff thought it should have been furnished, or due to the inefficiency or lack of qualification of the labor supplied as compared to the standard of efficiency and qualification of such relief labor as contemplated by the contract. No one representing the Government restricted plaintiff in any way from hiring organized labor under and pursuant to the provisions of Article 19 (b) of the contract. Plaintiff did not seek by proper application to the contracting officer to invoke the provisions of paragraph (b) of this Article.

Various factors other than labor entered into the performance of the work and increased plaintiff's costs over what it had estimated, including many acts of plaintiff which materially contributed to its excess costs, among which was plaintiff's large underestimate of unit prices for placing reinforcing steel and for placing concrete; there are also items of excess costs which are not proved to be properly includible in plaintiff's computation of its claimed excess costs for insufficient, unqualified, and inefficient labor.

A fair and reasonable amount to cover plaintiff's excess costs due to its underestimate of labor costs by reason of failure of the relief labor used on the work, under Article 19 of the contract, to meet the standards of qualification and efficiency expected and assumed by plaintiff when making its bid, did not exceed $75,000.

Plaintiff's total gross cost of performing the concrete and reinforcing steel work, including the overhead expense claimed by plaintiff, appears to have been about $683,640.16. A fair and reasonable cost of performing this concrete and reinforcing steel work according to the contract and specifications, considering the labor and other conditions existing in the area where the work was carried on and which labor and other conditions were known or should have been known to plaintiff when it made its bid, did not exceed $651,016.90, including overhead expense. The "engineer's estimate," referred to in findings 4 and 5, included the amount of $674,830.29, including overhead and a profit, as the probable reasonable cost of performing the concrete and reinforcing steel work according to the contract and specifications. By making allowance for a reasonable profit in the engineer's estimate, the estimated actual cost, including overhead, of placing the concrete and reinforcing steel was about $616,802.73. On the basis of the various items of costs, including labor costs, taken into consideration by defendant's engineer, his estimate was fair and reasonable for this work in the light of all the circumstances and conditions available to and open for consideration by bidders. Plaintiff's actual cost of performing the work included a number of items of cost, other than labor, which were not taken into consideration by defendant's engineer in making his estimate.

43. September 27, 1937, the plaintiff, after completion of the contract, wrote a letter addressed to "The Contracting Officer, Yuma, Arizona" in which plaintiff presented its claim for alleged excess costs incurred in the execution of the contract due to alleged failure of the defendant to furnish sufficient labor and labor that was sufficiently qualified and efficient to perform the work required. This claim, after consideration by the construction engineer and the contracting officer, was denied and plaintiff was so advised. When plaintiff received final payment under the contract it executed a release, September 29, 1937, in favor of the United States reserving its right to file and prosecute its claim against the Government for the items of the increased costs herein sued upon.

October 28, 1937, plaintiff appealed from the denial of its claim on October 4, 1937, to the Secretary of the Interior. The head of the Department instructed the contracting officer to make specific findings of fact and decision on plaintiff's claim. The construction engineer and the contracting officer on July 2, 1938, made findings of fact in connection with and against plaintiff's claim, a copy of which was furnished to plaintiff, and recommended denial of the claim on the basis of the facts as found. These findings and decision of the contracting officer are in evidence as plaintiff's exhibit 25, and are made a part hereof by reference.

August 24, 1938, plaintiff filed an additional appeal to the Secretary of the Interior from the findings of fact and recommendation of the contracting officer and in this appeal discussed and argued its claim at length and in detail. After consideration of plaintiff's claim, the findings of fact and decision of the contracting officer, and plaintiff's appeal, the Secretary of the Interior on July 12, 1939, denied the claim and affirmed the decision and findings of the contracting officer.

Plaintiff did not allege in its petition and has not proved that the findings and decisions of the contracting officer and the head of the Department against its claim were arbitrary or so grossly erroneous as to imply bad faith.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff was the lowest responsible bidder under specifications and a unit price contract form to be executed by the successful bidder and the Government for the construction within the State of California of four reinforced concrete Wash Siphon structures over and along the All-American Canal. This canal and the Wash Siphon structures were a part of the facilities to be constructed in connection with the larger project known as the Imperial Dam. The Wash Siphon structures for the construction of which plaintiff was the successful bidder were designed to carry surface floodwaters over the All-American Canal in such a way as to avoid damage to the canal from such floodwaters, and, also, to provide highway bridges over the canal. The Imperial Dam, the canal and the wash structures, were all in the process of construction at about the same time. Plaintiff's bid of unit prices for the various items of work specified was accepted after an investigation of plaintiff's experience and financial ability to perform the work required, and the contract form on the basis of which bid was made was signed by plaintiff December 30, 1935 and by defendant January 16, 1936. Notice to proceed was given January 20, 1936, and the work as called for by the contract and specifications was completed and accepted before the expiration of the contract date for completion September 14, 1937.

The three principal items of about sixteen units of work and material required on each of the four structures were (1) excavation, (2) hauling and placing reinforcing steel, and (3) hauling, mixing and placing concrete in floor slabs and structures. Defendant furnished all reinforcing steel, cement and concrete aggregates and all other material except as set forth in paragraph 24 of the specifications (Finding 4). Plaintiff bid 30 cents per cubic yard for excavation, one cent per pound for placing reinforcing steel, $6 per cubic yard for concrete in floor slabs and $8.50 per cubic yard for concrete in structures. The excess costs incurred by plaintiff over the unit prices bid, and for which claim for damages

is here made, were in connection with the performance of the reinforcing steel and concrete work. On this account plaintiff seeks to recover $318,597.21 as the excess cost over its bid for concrete and $23,152.32 as the excess cost over its bid for reinforcing steel, which, together with other items of alleged general excess costs, including profit, as set forth in finding 39, total $400,666.50.

This claim for damages is based on the allegation that defendant breached Article 19 of the contract in that it failed, through the National Reemployment Service office, (1) to refer skilled and unskilled relief laborers to plaintiff promptly, (2) to refer sufficient skilled and unskilled relief laborers, (3) that workmen referred were to an unusually large extent unqualified for the work for which they were requisitioned, and (4) that the relief labor referred by the employment service and used by plaintiff on the job was inefficient.

Article 19 of the contract provided in full as follows:

> EMPLOYMENT SERVICES—(a) With respect to all persons employed on projects, except as otherwise provided herein, (a) such persons shall be referred for assignment to such work by the United States Employment Service, or such other employment agency designated by the Works Progress Administration, and (b) preference in employment shall be given to persons from the public relief rolls, and, except with the specific authorization of the Works Progress Administration, at least ninety percentum (90%) of the persons employed on any project shall have been taken from the public relief rolls: PROVIDED, HOWEVER, That, expressly subject to the requirement of subdivision (b), the supervisory, administrative and highly skilled workers on the project, as defined in the specifications, need not be so referred by the United States Employment Service or such other employment agency designated by the Works Progress Administration.
>
> (b) All organized labor, skilled and unskilled, when organized labor is desired and requested by the contractor, which is employed upon projects prosecuted under contract shall be supplied by the employment agency designated by the United States Employment Service or Works Progress Administration, from the membership of recognized unions, with preference, first, to those members of such unions who constitute regular employees of the contractor and who are on the

local public relief rolls, second, to other members of such unions who are on the relief rolls, and upon the exhaustion of union members on such rolls, to any other members of the union. In the event, however, that qualified workers are not made available from the membership of the unions within forty-eight hours (Sundays and holidays excepted) after a request therefor is filed by the contractor, and the employment agency has notified the unions of the receipt of such request, such labor may be chosen by the contractor from other qualified workers, supplied by employment agencies designated by the United States Employment Service or Works Progress Administration.

(c) No person under the age of sixteen years and no one whose age or physical condition is such as to make his employment dangerous to his health or safety, or the health and safety of others, may be employed on the project. This paragraph shall not be construed to operate against the employment of physically handicapped persons otherwise employable where such persons may be safely assigned to work which they can ably perform.

(d) Except as otherwise specifically provided in this contract, workers who are qualified by training and experience and certified for work on the project by the United States Employment Service shall not be discriminated against on any grounds whatsoever.

Paragraph 19 of the specifications listed the skilled-labor classifications which were exempted by the Works Progress Administration from the requirements of Article 19 (a) of the contract that 90 percent of the persons employed on the project should be taken from the public relief rolls, provided the United States Employment Service certified in writing to the Bureau of Reclamation that skilled labor in such classifications was not available from relief sources. The labor classifications so specified in this paragraph are not involved in this suit.

The essential facts as established by the evidence of record and pertinent to the issues presented are set forth in the findings. Upon those facts we are of opinion that it cannot be said that defendant breached any of the provisions of Article 19 of the contract. It appears from a study of the whole record that plaintiff simply underestimated the unit prices at which it could perform the work called for with

relief labor at a profit. The contract and specifications were prepared under rules and regulations of the President and the Works Progress Administration issued under the Emergency Relief Appropriation Act of 1935, approved April 8, 1935.* The purpose of making the contract at the time was to provide employment for persons on the public relief rolls in the community where the work was to be performed. Plaintiff knew this, but the evidence shows that plaintiff when making its bid of unit prices for the main items of the work which, for the most part were to be performed by relief labor, failed to properly take that fact into consideration. Plaintiff made no investigation of labor conditions in the area and gave no consideration to the fact that this work was located in the desert and agricultural section of California from which the labor to be used in the performance of the contract would have to be drawn. This work was financed in part by certain counties in California and, of course, California relief labor had preference. In addition plaintiff seems not to have given consideration to the fact that there were other large work relief projects being carried on and planned in the vicinity of the work for which it was making a bid. Plaintiff knew of such projects and had bid upon the largest one. It received invitations to bid on others. Plaintiff says that when preparing its bid it assumed that defendant would furnish it promptly as needed "sufficient and competent workmen of average ability such as defendant had furnished plaintiff from the relief rolls on prior contracts, either skilled or unskilled, to carry on the contract work in an orderly manner, or in accordance with plaintiff's progress schedule, in accordance with the plain intent and requirements of said contract." Just what that assumed standard of average qualification and efficiency was is not very clear from the record, but it is clear from the record that the standard of qualification and efficiency was much higher than plaintiff had a right to expect under the circumstances and conditions. Plaintiff's "prior contracts" appear to have been at or near industrial communities or in areas where the relief labor was likely to be more experienced in construction

*49 Stat. 115.

work. The contract made no representations as to the relief labor other than that "at least ninety per centum (90%) of the persons employed on any project shall have been taken from the public relief rolls." Defendant did not assume to warrant or guarantee on any standard the qualification, competency, or efficiency of the relief labor to be referred on plaintiff's requisitions for assignment by plaintiff to such work. Under the contract the plaintiff was the sole judge as to whether it would reject, employ, or discharge any workmen referred by the United States Employment Service. *Western Construction Company* v. *United States*, 94 C. Cls. 175; *Nolan Brothers* v. *United States*, 98 C. Cls. 41, 81, 82. The contract provided for the way in which relief or non-relief labor was to be secured in the event sufficient local relief labor could not be supplied. Plaintiff got along with the labor supplied by the local employment office and made no application concerning labor to the contracting officer as required under paragraph (b) of Article 19 of the contract and paragraph 14 of the specifications and regulations of the Works Progress Administration.

The evidence shows that the average quality and efficiency of the labor referred by the local National Reemployment Service were not below but, on the whole, was above that which plaintiff had a right reasonably to expect under the conditions and circumstances which prevailed when it made its bid. In *Seeds & Derham* v. *United States*, 92 C. Cls. 97, 116, the court in denying recovery on the ground of alleged unqualified labor referred by the United States Employment Service, said:

> No doubt the labor was not the best that could have been obtained. It was obtained from the relief rolls, and while there were some excellent men on the relief rolls during the period in question, it is common knowledge that the majority of them were not of the most efficient type.

The holding in the *Seeds & Derham* case is applicable here.

As to plaintiff's allegation that defendant failed to promptly furnish labor as needed, the evidence shows that there was no unreasonable delay in referring labor as

promptly as was possible under the circumstances. Defendant acted diligently and did all it could to refer all labor requisitioned by plaintiff. Any delay that occurred in receiving labor at the time plaintiff desired to use it was due either to failure of plaintiff properly to anticipate its needs in time for the labor to be referred and to report, or to failure of the workmen referred to report promptly. Defendant was only bound to act with reasonable promptness in referring workmen when requested and was not bound by any stipulation to have such workmen report for work within any stated period of time.

The proof fails to establish that defendant breached any provision of the contract and plaintiff is, therefore, not entitled to recover as damages any part of the cost of performing the reinforcing steel and concrete work in excess of the amount due therefor under the contract computed at the agreed unit prices.

Plaintiff's claim for excess cost of $399,077.33 under *quantum meruit* is computed by it as follows:

Cost of concrete work	$601,745.75	
Cost of reinforcing steel work	84,129.40	$685,875.15
Total of cost items included in above, now abandoned		34,858.25
Total claimed cost		651,016.90
Anticipated profit claimed		36,940.78
Total claimed cost plus profit		687,957.68
Paid at contract unit price for concrete work	$235,574.89	
Paid at contract unit price for reinforcing steel work	53,305.46	288,880.35
Difference		399,077.33

This alternative claim of plaintiff is based upon the contention that at the time plaintiff made its bid and at the time it was accepted and the contract executed, defendant concealed from plaintiff certain material facts known to defendant but unknown to plaintiff which, it is contended, resulted in plaintiff making a gross error of about 50 percent in its bid of unit prices for the concrete and reinforcing steel items of work. The "material facts" which it is insisted the defendant wrongfully and unlawfully concealed were first, the fact that the Chief Engineer of the Bureau of Reclamation

prepared an estimate, amounting to a total of $821,432.50, of the probable cost, including profit, based on the estimated quantities for performing the entire work specified, and second the fact that "the defendant intended to furnish to plaintiff labor that would be of less than average efficiency."

This claim cannot be sustained on the record in this case. Judgment on the basis of *quantum meruit* cannot be allowed where there is a valid contract between the parties. Where the Government in the invitation for bids or in specifications makes a misrepresentation of material fact or in making representations to bidders conceals material facts and information known to it but not available to or known to the bidder, damages by way of excess costs resulting therefrom in the performance of the contract may, under implied terms of the contract, be recovered in a suit on the contract.

In the case at bar there was no misrepresentation by defendant and there was no concealment by defendant of any fact which it was under a legal duty to disclose to bidders or of any fact known to it and unknown and unavailable to bidders, and the proof does not show fraud, duress, accident, or such mistake as would justify the application of equitable principles under the equitable jurisdiction conferred upon this Court by section 145 of the Judicial Code (sec. 250, U. S. Code, Title 28). See *Harvey* v. *United States*, 8 C. Cls. 501, 512, 513; *South Boston Iron Works* v. *United States*, 34 C. Cls. 174, 197–202; *Harvey* v. *United States*, 105 U. S. 671; *United States* v. *Jones, et al.*, 131 U. S. 1, 14–19; *United States* v. *Milliken Imprinting Co.*, 202 U. S. 168, 173, 174; *Wm. Cramp & Sons Ship and Engine Building Co.* v. *United States*, 239 U. S. 221, 227–233; *Ackerlind* v. *United States*, 240 U. S. 531, 533, 534; *Hartsville Oil Mill Co.* v. *United States*, 271 U. S. 40, 49; *Hazelhurst Oil Mill & Fertilizer Co.* v. *United States*, 70 C. Cls. 334, 346–357; *Edmund J. Rappoli Company, Inc.* v. *United States*, 98 C. Cls. 499.

When advertising for competitive bids as required by law the Government usually makes an estimate for its own use of the probable cost of the project under consideration, but it is under no obligation to furnish such estimate to bidders. To do so would tend to destroy competition among

bidders which is required by the statute authorizing the making of contracts by the Government. The parties are dealing at arms length and bidders are presumed to be qualified to estimate the price at which they can perform the work specified at a reasonable profit. If they fail to do so, as plaintiff did in this case, the Government cannot for that reason be held for the resulting loss.

Plaintiff wanted this contract and made its bid of unit prices as low as it felt it could in order to obtain an award of the contract. In doing so, however, plaintiff failed to consider and investigate the labor situation which, in view of Article 19 of the contract, it should have done. The proof shows very clearly that no one representing defendant had knowledge of any particular facts concerning labor to be used in performance of the contract which were not known or available to bidders, including plaintiff. See finding 5. Plaintiff is not entitled to recover on its alternative claim.

In addition to the reasons already given, plaintiff is precluded upon the facts in this case from recovering by reason of the provisions of paragraph 14 of the specifications (Finding 3) and by reason of the finality under Article 15 of the contract of the findings of fact made by the contracting officer and affirmed by the head of the department with respect to the questions involved herein, and which arose during prosecution of the work in performance of the contract. The contracting officer made findings of fact against plaintiff's claim that the defendant failed to refer sufficient labor with reasonable promptness and that the skilled and unskilled labor referred was so unqualified and inefficient as to constitute a breach of Article 19 of the contract. These findings are not shown to have been arbitrary or grossly erroneous.

Plaintiff is not entitled to recover and the petition must, therefore, be dismissed.

It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

Reporter's Statement of the Case

MT. HEBRON CORPORATION, A CORPORATION, v. THE UNITED STATES

[No. 45169. Decided October 4, 1943]

On the Proofs

Capital stock tax levied on privilege of doing business as a corporation.—Where individuals, on account of the liabilities incident to a business venture, did not want to enter upon the venture in their individual capacities and chose, instead, to avail themselves of the protection of a corporation, which did undertake the business venture of acquiring stock in another corporation with success and profit over a period of years, repaying from its profits large sums of money borrowed for the purpose of purchasing the stocks; it is *held* that the corporation, plaintiff, was "carrying on or doing business" within the meaning of the statute levying an excise tax on the privilege of doing business as a corporation. *Stanley Securities Co.* v. *United States*, 69 C. Cls. 271, 283, and cases therein cited.

Same.—Following the decision in *Magruder* v. *Realty Corp.*, 316 U. S. 69, the plaintiff corporation was "actively engaged in fulfilling the purpose of its creation," which was that of acquiring property.

The Reporter's statement of the case:

Mr. R. M. O'Hara for the plaintiff.

Mr. John A. Rees, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a corporation organized on August 2, 1927, under the laws of the State of New York, with an authorized capital of 120 shares of no par value stock.

2. Plaintiff was incorporated for the purpose of acquiring and holding stock of the Cedar Grove Cemetery Association, which owned cemetery property located at Flushing, Borough of Queens, City of New York. Its outstanding capital stock in 1927 was 20,000 shares, of which 10,000 were then owned by Rutherford H. Walker and Thaddeus Walker.

3. Plaintiff's original paid-in capital consisted of $12,000 in cash, for which plaintiff issued all of its no par value stock. This capital was contributed as follows: Jacob Singer, $4,000 for 40 shares; Murray E. Schlein, $4,000 for 40 shares; Harry M. Cohen, $4,000 for 40 shares. These

three men were the sons, respectively, of Louis Singer, Elias Schlein and Morris Cohen, who were themselves equal members of a partnership known as Singer, Schlein & Cohen, which for some years had engaged exclusively in the business of acting as managers for and as sales agents of cemetery properties, including the Cedar Gròve Cemetery Association. Murray E. Schlein became the first president of the plaintiff corporation. Since 1923 he has been a member of the partnership of Singer, Schlein & Cohen. Harry M. Cohen became plaintiff's first treasurer. Since 1923 he also has been a member of the partnership of Singer, Schlein & Cohen. Jacob Singer became plaintiff's first secretary. He also entered the partnership of Singer, Schlein & Cohen in 1923.

4. On August 26, 1927, plaintiff entered into a written agreement with Rutherford H. Walker and Thaddeus Walker for the purchase of 10,000 shares of the stock of Cedar Grove Cemetery Association. The agreed purchase price was $700,000, of which $350,000 was paid in cash. The balance of $350,000 was covered by fourteen promissory notes for $25,000 each, bearing interest at the rate of 3 percent per annum, and payable on February 1 and August 1 of each year commencing with 1928 and continuing to 1934.

5. Plaintiff, to enable it to meet the agreed cash payment of $350,000, borrowed the sum of $340,000 from the partnership of Singer, Schlein & Cohen.

6. On December 4, 1930, plaintiff entered into a further written agreement covering the purchase of 9,885 shares of the stock of Cedar Grove Cemetery Association for a total consideration of $691,950.

7. Plaintiff paid in cash the sum of $366,170. To cover the balance of $325,780 plaintiff gave twelve promissory notes for $25,000 each and one promissory note for $25,780. Eight of the said notes for $25,000 each were to be paid semi-annually commencing on April 21, 1931, and ending October 21, 1934. The remaining notes were to be paid, two of them on April 21, 1935, and three on October 21, 1935. The note for $25,780 was one of three which matured on October 21, 1935. The notes bore interest at the rate of 5 percent for the first two and one-half years, and 5½ percent thereafter.

8. The money required to meet the agreed cash payment was borrowed by plaintiff from the partnership of Singer, Schlein & Cohen.

9. Simultaneously with this further loan to plaintiff by Singer, Schlein & Cohen, the partnership of Singer, Schlein & Cohen subscribed to 1,080 shares of the no par value stock of plaintiff and paid therefor the sum of $213,000. Such payment was made by reducing the amount of plaintiff's indebtedness to the partnership by said amount. To permit the issuance of the additional 1,080 shares, plaintiff on October 15, 1930, filed a Certificate of Increase of Capital Stock, pursuant to section 36 of the Stock Corporation Law of the State of New York. After December 4, 1930, and at all times relevant to this proceeding, plaintiff's outstanding capital stock consisted of 1,200 shares of its no par value stock, which was subscribed to and held as aforesaid.

10. During the period of plaintiff's existence prior to July 1, 1932, plaintiff received dividends in various amounts on its holdings of stock of Cedar Grove Cemetery Association, and used such dividends to discharge, in part, its indebtedness.

11. On July 1, 1932, plaintiff owed $175,000 in principal amount on the notes given by it to the prior owners of the stock of Cedar Grove Cemetery Association. In addition, it owed $482,096.13 on loans made to it by Singer, Schlein & Cohen. It had cash of $1,167.98 in its treasury. During the taxable year ended June 30, 1933, it received dividends from Cedar Grove Cemetery Association and made disbursements as follows:

Dividends received

Date	*Amount*
December 5, 1932	$74, 568. 75
April 6, 1933	64, 626. 25
June 16, 1933	59, 655. 00

Disbursements

Date	*Description*	*Amount*
December 5, 1932	To Singer, Schlein & Cohen in repayment of loans.	$74, 000. 00
April 6, 1933	To Singer, Schlein & Cohen in repayment of loans.	64, 000. 00
June 16, 1933	To Singer, Schlein & Cohen in repayment of loans.	60, 000. 00

12. On July 27, 1932, plaintiff borrowed from Singer, Schlein & Cohen the sum of $29,000 and used the said sum to pay on August 1, 1932, the sum of $28,750, representing principal and interest due on its purchase money notes, retaining in its treasury the excess of $250. On October 25, 1932, plaintiff borrowed from Singer, Schlein & Cohen the sum of $1,250 and used the said sum to pay, on the same date, interest of $1,289 due on purchase money notes. The excess of $39 was paid out of money then in plaintiff's treasury. On April 27, 1933, plaintiff borrowed from Singer, Schlein & Cohen the sum of $1,000 and used the said sum to pay interest of $1,269.50 due on its purchase money notes. The excess of $269.50 was paid out of money then in plaintiff's treasury.

13. During the taxable year ended June 30, 1933, plaintiff also paid to the State of New York a franchise tax in the amount of $747.93.

14. On July 1, 1933, plaintiff had cash of $1,211.39 in its treasury. During the taxable year ended June 30, 1934, plaintiff received dividends from Cedar Grove Cemetery Association and made disbursements as follows:

Dividends received

Date	Amount
January 6, 1934	$74, 568. 75
June 12, 1934	89, 482. 50

Disbursements

Date	Description	Amount
January 6, 1934	To Singer, Schlein & Cohen in repayment of loans.	$74, 000. 00
June 12, 1934	To F. H. Walker, Executor of the Estate of F. Walker, in payment of purchase money notes.	20, 500. 00
June 12, 1934	To Singer, Schlein & Cohen in repayment of loans.	69, 000. 00

15. On July 24, 1933, plaintiff borrowed from Singer, Schlein & Cohen the sum of $1,000. On September 13, 1933, plaintiff borrowed from Singer, Schlein & Cohen the sum of $106,000 and used the said sum, plus $739.22 out of its treasury, to pay on September 14, 1933, principal and interest on its purchase money notes in the amount of $106,739.22. On No-

vember 13, 1933, plaintiff borrowed from Singer, Schlein & Cohen the sum of $1,000 and used the said sum to pay on the same day interest due on its purchase money notes in the amount of $1,375. On May 6, 1934, plaintiff borrowed from Singer, Schlein & Cohen the sum of $1,000 and used it to pay on the same day taxes due to the State of New York in the amount of $862.43, and interest due on purchase money notes in the amount of $687.50. The excess of the disbursements of November 13, 1933, and May 6, 1934, over the loans on the same dates was paid out of money then in plaintiff's treasury.

16. On July 1, 1934, plaintiff had cash of $1,073.31 in its treasury. During the taxable year ended June 30, 1935, plaintiff received dividends from Cedar Grove Cemetery Association and made disbursements as follows:

Dividends received

Date	*Amount*
January 8, 1935	$124, 906. 25
June 28, 1935	114, 913. 75

Disbursements

Date	*Description*	*Amount*
January 9, 1935	To Singer, Schlein & Cohen in repayment of loans.	$100, 000. 00
February 18, 1935	To F. H. Walker, Executor of the Estate of F. Walker, in payment of purchase money notes.	22, 500. 00
May 8, 1935	To Collector of Internal Revenue, covering Capital Stock Tax for 1933, plus interest.	1, 782. 50
June 28, 1935	To State Tax Commission in payment of Franchise Tax.	1, 029. 05
June 28, 1935	To Singer, Schlein & Cohen in repayment of loans.	112, 000. 00
November 3, 1934	To F. H. Walker, Executor of the Estate of F. Walker, in payment of interest on purchase money notes.	687. 50
December 31, 1934	To New York State Tax Commission—tax on corporate dividends.	2. 00
March 25, 1935	To Murray E. Schlein—Expenses in defence of claim against plaintiff for taxes alleged to be due under Section 104 of the Revenue Act of 1932.	26. 60

17. For some years prior to July 1934 the dividends payable on two blocks of 50 shares each of Cedar Grove Cemetery Association stock had been unclaimed. The accrued and unpaid dividends then amounted to $2,800 on one such block of stock and $2,146.25 on the other such block of stock. On July 2, 1934, plaintiff purchased from one Trenkamp the 50 shares of stock on which the unpaid dividends amounted to $2,800. Under the terms of the purchase plaintiff became entitled to any accrued and unpaid dividends on such stock. The purchase price was $4,737.50, and to make the agreed payment plaintiff borrowed $2,000 from Singer, Schlein & Cohen, and also used $2,737.50 of the dividends of $2,800 which were paid to it by Cedar Grove Cemetery Association.

18. On August 16, 1934, plaintiff purchased from one Moller the 50 shares of stock on which the accrued and unpaid dividends amounted to $2,146.25. Under the terms of the purchase plaintiff became entitled to any accrued and unpaid dividends on such stock. The purchase price was $3,700, and to make the agreed payment plaintiff borrowed $2,000 from Singer, Schlein & Cohen, and also used $1,700 of the dividends of $2,146.25 that were paid to it by Cedar Grove Cemetery Association.

19. On July 1, 1935, plaintiff had cash of $3,374.31 in its treasury. During the taxable year ended June 30, 1936, plaintiff received dividends from Cedar Grove Cemetery Association as follows:

Dividends received

Date	*Amount*
January 8, 1936	$119,910.00
June 8, 1936	89,932.50

Of the above dividend of January 8, 1936, the sum of $78,163.85 was disbursed on January 9, 1936, in full payment of the balance of the loans due to Singer, Schlein & Cohen. The plaintiff's liability on purchase money notes had been liquidated in full on February 18, 1935. The balance of the dividend of January 8, 1936, was retained by plaintiff in its treasury. The dividend of $89,932.50 received by plaintiff on June 8, 1936, was retained by plaintiff in its treasury. During this year plaintiff also expended small sums in pay-

ment of capital stock tax, New York State franchise tax, and for attorney's fees. On June 20, 1936, plaintiff declared and paid to its stockholders a dividend of $120,000. On June 30, 1936, plaintiff had in its treasury cash of $11,009.16, all of which was on deposit with Irving Trust Company of New York City.

20. The receipts and expenditures as set out above are a complete statement of all receipts and expenditures by plaintiff during the period from July 1, 1932, to June 30, 1936.

21. The sole asset owned by plaintiff between July 1, 1932, and June 30, 1936, aside from the cash in its treasury from time to time, consisted of stock of the Cedar Grove Cemetery Association. The only income of plaintiff over the same period consisted of dividends on the stock of Cedar Grove Cemetery Association.

22. Plaintiff has always kept a set of books consisting of its check book, cash book, journal, and general ledger. It maintains additional records consisting of its minute book and its stock certificate book. It has never had any clerks or any employees other than its officers. It has never paid any compensation, directly or indirectly, to any officer, stockholder, or employee. It has never had a listed telephone. Plaintiff has never had any stationery bearing its name. It has never sold any of the stock of Cedar Grove Cemetery Association, which it acquired in pursuance of the purpose of its organization, and still owns all of it. It has never maintained an office. Its address has at all times been 7800 Myrtle Avenue, Brooklyn, New York. This is the office of Mt. Lebanon Cemetery. The plaintiff's president, Murray E. Schlein, is associated in the management of Mt. Lebanon Cemetery.

23. The officers of plaintiff and of Cedar Grove Cemetery Association during the calendar years from 1932 to 1936, inclusive, were as follows:

Year	Office	Mt. Hebron Corporation	Cedar Grove Cemetery Association
1932	President	Murray E. Schlein	Clinton T. Roe.
	Vice-Pres.		Harry M. Cohen.
	Secretary	Jacob Singer	Jacob Singer.
	Treasurer	Harry M. Cohen	Murray E. Schlein.
	Asst. Secy.		Morris Cohen.
1933	President	Murray E. Schlein	Clinton T. Roe.
	Vice-Pres.		Harry M. Cohen.
	Secretary	Jacob Singer	Jacob Singer.
	Treasurer	Harry M. Cohen	Murray E. Schlein.
	Asst. Secy.		Morris Cohen.
1934	President	Murray E. Schlein	Clinton T. Roe.
	Vice-Pres.		Harry M. Cohen.
	Secretary	Jacob Singer	Jacob Singer.
	Treasurer	Harry M. Cohen	Murray E. Schlein.
	Asst. Secy.		Morris Cohen.
1935	President	Murray E. Schlein	Clinton T. Roe.
	Secretary	Jacob Singer	Jacob Singer.
	Treasurer	Harry M. Cohen	Murray E. Schlein.
1936	President	Murray E. Schlein	Clinton T. Roe.
	Secretary	Jacob Singer	Jacob Singer.
	Treasurer	Harry M. Cohen	Murray E. Schlein.

24. Plaintiff duly filed, on Treasury Form 707, capital stock tax returns for each of the taxable years ended June 30, 1933, 1934, 1935, and 1936. In each of said returns plaintiff claimed exemption from the tax on the ground that it was not carrying on or doing business within the meaning of the pertinent statutes.

25. Said claims for exemption were denied by the Commissioner of Internal Revenue, and the capital stock taxes shown to be due on said return were paid to the Collector of Internal Revenue for the First District of New York on the following dates and in the amounts indicated:

Taxable year ended:	*Date of payment*	*Amount*
June 30, 1933	May 21, 1935	$1,782.50
June 30, 1934	January 14, 1936	1,689.86
June 30, 1935	October 6, 1936	1,787.53
June 30, 1936	May 10, 1937	1,461.98

26. The above amounts paid to the Collector of Internal Revenue on the dates indicated consisted of the tax shown on said capital stock tax returns plus interest to the respective dates of payment. The tax and interest included in each said payment are as follows:

Taxable year:	*Tax*	*Interest*	*Total*
1933	$1,500.00	$282.50	$1,782.50
1934	1,500.00	189.86	1,689.86
1935	1,666.00	121.53	1,787.53
1936	1,400.00	61.98	1,461.98

27. On April 15, 1938, plaintiff filed with the Collector of Internal Revenue for the First District of New York claims for refund of the capital stock taxes and interest thereon paid as aforesaid for each of the taxable years ended June 30, 1933, 1934, 1935, and 1936.

On May 21, 1938, the Commissioner of Internal Revenue addressed to the plaintiff a registered letter containing notice of the rejection of its aforesaid claims for refund.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

This is a suit to recover capital stock tax on the ground that plaintiff was not engaged in business.

Singer, Schlein and Cohen were managers of cemetery properties, including the Cedar Grove Cemetery Association. The senior partners wanted their sons, who were also members of the partnership, to acquire an interest in this company. Rutherford H. Walker and Thaddeus Walker had 10,000 shares of its stock which they were willing to sell for $700,000, $350,000 in cash, and the balance in installments. The sons were willing to buy it at this price, but they had available only $4,000 each, so the balance had to be borrowed. Presumably because they did not want to become personally liable for this large amount of money, they formed a corporation to borrow the money and buy the stock. To meet the cash payment this corporation borrowed from the partnership of Singer, Schlein & Cohen $340,000 for which it gave its note. This amount and $10,000 of the $12,000 which the young men had paid for plaintiff's stock was paid in cash for the 10,000 shares of stock of the Cedar Grove Cemetery Association, and plaintiff's notes were given for the balance.

The capital stock tax is levied on the privilege of doing business as a corporation. *Stanley Securities Co.*, v. *United States*, 69 C. Cls. 271, 283, and cases there cited. These young men did not want to enter on this venture in their individual capacities, with the liabilities incident thereto, but chose, instead, to avail themselves of the protection of a corporation. It is on the privilege of doing this, if this be doing

business, that the tax is levied. The tax is levied "with respect to carrying on or doing business." The business at hand was the acquisition of this stock, the acquisition of the money to repay the money borrowed to make the cash payment and to pay the balance of the purchase price. The task at hand was to accumulate $690,000. Such an undertaking seems to us a business enterprise of considerable magnitude, with an investment of only $12,000. Since a corporation was used to carry out this business enterprise, liability for the excise tax imposed on this privilege accrues.

Later, all the members of the partnership of Singer, Schlein & Cohen used the plaintiff corporation to buy 9,885 additional shares of the Cedar Grove Cemetery Association stock. This involved a cash payment of $366,170 made by plaintiff corporation out of money borrowed from the partnership and the execution of its notes to cover the balance of $325,780. Still later 100 additional shares were bought by plaintiff with money advanced by the partnership. This gave plaintiff all but 15 shares of the total outstanding stock.

When it started the corporation had $12,000; within less than ten years it had bought and paid for 19,985 shares of the Cemetery stock at a cost of about $1,400,000; it had declared a dividend of $120,000, and it had $11,009.16 in its treasury. The venture had been highly successful. To have accomplished it was certainly doing business. It was accomplished by a wise investment, in the first place, and, then, by fine management of the properties by plaintiff's officers, all of whom were on the Board of Directors of the Cedar Grove Cemetery Association, under the guidance, no doubt, of their elder associate partners.

There have been a great many cases since the enactment of the Excise Tax Act of 1909* on what constitutes doing business, but no case just like this one has been found. However, the principle on which *Magruder* v. *Realty Corp.*, 316 U. S. 69, was decided is applicable here. In that case the company had been formed to take over property acquired by a bondholders' committee at a foreclosure sale and to sell it as soon as satisfactory prices could be obtained. Pending sales

*Tariff Act of 1909, section 38; 36 Stat. 11, 112.

the properties were rented under short term leases to take care of the carrying charges. The corporation was held to be engaged in business. The court said:

> * * * During the period in question, respondent did not fall into that state of quietude, covered by the specific language of Article 43 (b) (2),[1] in which it was merely owning and holding specific property and distributing the resulting proceeds. See *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187; cf. *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503, 516–17. On the contrary, respondent was actively engaged in fulfilling the purpose of its creation, the liquidation of its holdings for the best obtainable price.

Here, as there, the corporation was "actively engaged in fulfilling the purpose of its creation," there, of liquidating, here, of acquiring property. Neither corporation had fallen "into that state of quietude, covered by the specific language of Article 43 (b) (2) [Treasury Reg. 64, 1936 ed.], in which it was merely owning and holding specific property and distributing the resulting proceeds."

We think the activities of this corporation were considerably broader than were those discussed in *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187, *McCoach* v. *Minehill and Schuylkill Haven Railroad Co.*, 228 U. S. 295, and *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U. S. 28, relied on by plaintiff. The corporations in the first two cases for a number of years had been active, but later each one had leased its entire properties to a single lessee and was doing nothing more than receiving and distributing the rent. In the last case the corporation was organized by the Emery, Bird, Thayer Dry Goods Company, which operated a dry goods store, for the sole purpose of holding title to the real estate owned by the Dry Goods Company. Its sole activity was in receiving and distributing the rent received from the Dry Goods Company.

[1] "*Exceptions.*—Ordinarily the exceptions to 'doing business' are restricted to limited activities of a corporation, such as—

* * * * *

"(2) the distribution of the avails of property and the doing only of such acts as may be necessary for the maintenance of its corporate status in the case in which the corporation either was organized for, or has reduced its activities to, the mere owning and holding of specific property."

The plaintiff in this case was engaged in the task of securing the money to purchase about $1,400,000 worth of stock, which it did over a period of about ten years. This was quite a sizable business enterprise. The individuals chose to do this through the medium of a corporation, rather than individually, and, for so doing, liability for the tax was incurred.

Plaintiff's petition will be dismissed. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

SOUTHERN RAILWAY COMPANY v. THE UNITED STATES

[No. 45227. Decided October 4, 1943] *

On the Proofs

Freight charges for transportation of Government property; equalization agreement; land-grant routes.—Where plaintiff, a non-land-grant railroad, entered into an agreement with the Government to transport over its lines Government property at the lowest net tariff rates lawfully available over land-aided routes between the same points of origin and destination; it is *held* that under the unambiguous terms of the equalization agreement plaintiff was obligated to equalize to the Government net rates computed in each case via the lawfully available land-grant route from point of origin to point of destination in fact producing the lowest net rate, regardless of whether such land-grant route was in fact commercially competitive and regardless of how circuitous and impractical it might be.

Same; competitive routes.—A railroad route which is competitive for commercial traffic may or may not be competitive for Government traffic which is subject to reduced rates over lawfully available land-grant routes.

Same; circuitous routing.—Circuitous routing is a well-known factor in connection with transportation rates and is favored by carriers to secure traffic and by shippers to meet particular situations.

Same; interpretation of equalization agreement.—As written, the equalization agreement under construction in the instant case,

* Plaintiff's petition for writ of certiorari granted March 6, 1944.

entered into by plaintiff with defendant, is easily understood and simple of administration, which was one of the main objects of the agreement; whereas the construction for which plaintiff contends would unavoidably result in uncertainty, confusion, and constant controversy, as demonstrated by the facts in the instant case.

Same; tariffs lawfully on file.—Any question as to whether it is unfair and unreasonable to require plaintiff to equalize net charges computed at lawful tariff rates via the land-grant routes used by defendant is foreclosed by the tariffs lawfully on file with the Interstate Commerce Commission.

Same; jurisdiction.—The question of reasonableness of railroad tariff rates and routes is one over which the Court of Claims has no jurisdiction.

The Reporter's statement of the case:

Mr. Seddon G. Boxley for the plaintiff. *Mr. S. R. Prince* was on the brief.

Mr. Assistant Attorney General Francis M. Shea for the defendant. *Messrs. Louis R. Mehlinger and Charles L. Brodman* were on the brief.

Plaintiff asks judgment for $10,898.26 as the balance alleged to be due from defendant as freight charges for the transporation of various shipments of Government property. Defendant asserts a counterclaim in the net amount of $1,251.73 for certain alleged overpayments of the freight due. The question presented involves the interpretation of paragraph 1 of the Freight Land-grant Equalization Agreement entered into by the parties November 29, 1933, as authorized by section 22 of the Interstate Commerce Act of February 4, 1887 (24 Stat. 379, 387; 49 U. S. Code, Sec. 22), under which agreement the Government was given reduced freight rates on shipments of Government property.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. The plaintiff, a Virginia corporation, now is and was during all the times hereinafter mentioned a common carrier of freight and passengers in interstate and intrastate commerce. It was the last or delivering carrier of all shipments hereinafter mentioned and as such is entitled to collect all freight charges.

All the transportation herein involved was completed within the statutory time for bringing suit, and none of the items are barred by the statute of limitations.

2. November 29, 1933, plaintiff and defendant entered into an agreement entitled "Freight Land-grant Equalization Agreement," a copy of which is marked "Plaintiff's Exhibit I" as a part of stipulation of facts herein. Therein plaintiff agreed (paragraph No. 1):

> To accept for the transportation of property shipped for account of the Government of the United States and for which the Government of the United States is lawfully entitled to reduced rates over land-grant roads, the lowest net rates lawfully available, as derived through deductions account of land-grant distance from the lawful rates filed with the Interstate Commerce Commission applying from point of origin to destination at time of movement.

This acceptance was made subject to the following condition:

> 2. (a) On traffic destined to and/or received from points on lines of other carriers this agreement will only apply in connection with such carriers as have an agreement of the form stated in paragraph 1 above on file with the Quartermaster General, War Department, Washington, D. C., except as otherwise provided under the heading of "Exceptions" in paragraph 3 below [exceptions not here in controversy].

The agreement was in full force and effect on the dates of transportation of all shipments embraced in this proceeding. The copy thereof referred to is made part of these findings by reference.

3. The purpose and effect of the freight equalization agreements of the defendant with plaintiff and with other common carriers was to equalize rates on Government property over various routes serving the same point of origin and destination, where one or more of those routes had been aided in whole or in part by grant of public lands, rates over all routes from point of origin to destination being brought down to the level of that over the route producing the lowest net rate on account of land-grant deduction.

This arrangement was designed to give the equalizing carrier a portion of the Government business that was possible of routing over the governing land-grant route, and to give the Government a greater range in choice of routes where considerations of economy entered into the selection.

All of the gross freight charges herein employed by one party or the other are, except as may hereinafter specifically appear, correctly derived either, on the one hand, from lawful rates on interstate traffic filed with the Interstate Commerce Commission, or, on the other, from undisputed intrastate rates, all filed with the Interstate Commerce Commission, and all applying from point of origin to destination at time of movement, in each instance over the route made use of for calculating net rates, if any, derived through deductions on account of land-grant distance.

All net charges respectively resulting from land-grant distance have been correctly computed herein for the several routes employed by either party, except as may hereinafter specifically appear.

Intrastate traffic is confined in this suit to the following items (not including those abandoned) listed in Exhibit No. 8 to the petition:

Item:	*Amount*	Item:	*Amount*	Item:	*Amount*
164	$13.42	218	$2.99	224	$18.19
168	.38	219	1.28	225	103.45
169	.37	220	33.51	226	10.91
215	26.14	221	18.22	227	33.15
216	22.81	222	33.90		
217	28.89	223	17.94		
Total					365.55

There is no dispute between the parties as to application of freight tariffs. The dispute herein is as to whether the available routes constructed from lawful tariffs and used by the defendant in calculating freight charges for purposes of payment are, irrespective of the tariffs, available for such use under the general freight land-grant equalization agreement. The parties herein stipulate that "If the Court should find that in the first and second causes of action defendant has not computed the charges in accordance with the tariffs and land-

grant equalization agreement hereinbefore cited, and that said tariffs and agreement are silent on the matter of distance limitations, then there is no fixed basis upon which plaintiff and defendant can agree for the computation of net charges in the absence of a determination by the Court of such mileage limitations as it may find to be proper within the contemplation of said tariffs and land-grant equalization agreement; but when said limitations, if any, are determined by the Court, charges in accordance therewith will be computed by the parties, and if in agreement, will be for stipulation as to the amount due the plaintiff or the defendant, as the case may be."

FIRST CAUSE OF ACTION

Federal Surplus Relief Corporation

(Exhibit No. 4 to the Petition)

4. In the summer months of the year 1934, the Federal Surplus Relief Corporation, as consignor and duly authorized agent of the United States, shipped over plaintiff's lines and its connections 147 shipments of livestock which are listed in Exhibit No. 4 to the petition, property of the United States, from points in Minnesota, Kansas, Illinois, Iowa, Missouri, Wisconsin, and Nebraska to points in North Carolina, South Carolina, Georgia, Tennessee, and Virginia. Each shipment was transported and delivered in accordance with what is known as "uniform livestock contracts." Upon delivery of the shipments at destinations, the uniform livestock contracts were surrendered to the delivering carrier together with stickers attached thereto reading in part as follows:

> Property of the Federal Government.
> Carriers' charges to be collected from the Federal Surplus Relief Corporation, Washington, D. C., in the same manner as if under a Government Bill of Lading.

5. For the transportation services so performed plaintiff submitted its bills on which it claimed freight charges totaling $88,481.89, of which aggregate defendant paid plaintiff $78,584.99, leaving a balance of $9,896.90 unpaid. Plaintiff abandons claim on items Nos. 8, 25, 45, 56, 65, 66, 75, 76, 77, 97, 101, 102, 103, 104, 109, 114, and 144 of Exhibit No. 4 to

the petition, totaling $384.68, leaving a balance of $9,512.22 now claimed by it to be due and unpaid.

6. The through commercial charges from points of origin to destination on the shipments listed in Exhibit No. 4 to the petition, except those indicated therein as having originated at East St. Louis (National Stock Yards), Illinois, are computed by both parties by combining charges from point of origin to Cairo, Illinois, with charges therefrom to destination. The controversy as to the net charges so combined relates solely to the question whether equalization with land-grant routes south of Cairo requires any deductions from commercial, that is to say, full face tariff charges, and if so, to what extent.

Those shipments indicated in Exhibit No. 4 to the petition as having originated at East St. Louis (National Stock Yards), Illinois, moved to their respective destinations under through rates published as such, and as to the gross amount thereof there is no dispute. The correctness of the proportion of the respective through rates and the land-grant deductions therefrom applied by the defendant north of Cairo in the computation of the amounts paid plaintiff is likewise not disputed.

The applicable tariff did not impose any distance limitations upon the application of the commercial rates published therein, which rates were applicable also on like commercial shipments between Cairo and East St. Louis (National Stock Yards), Illinois, as points of origin, and the respective destinations listed in Exhibit 4 to the petition, via the land-aided routes used by defendant in computing the charges payable under the equalization agreement.

7. The net rates claimed by plaintiff, and the net rates used and claimed by defendant, were in neither case computed over the routes by way of which the shipments actually moved. The routes of actual movement were in each instance shorter in distance and time than the routes used in the net rate calculations.

The route now constructed and used for equalization purposes by plaintiff from Cairo is as follows:

> Illinois Central R. R. to Martin, Tenn.; thence via Nashville, Chattanooga & St. Louis Ry. to Nashville,

Tenn.; thence via Tennessee Central R. R. to Harriman, Tenn.; thence via plaintiff's line.

This route included no land-aided line beyond Cairo. In certain instances plaintiff, however, in submitting its bills to defendant made some deductions south of Cairo for land-grant equalization, but less in amount than applied by the defendant in payment of plaintiff's bills. These particular deductions were inadvertently made by plaintiff's clerks and are not representative of plaintiff's practice.

8. On shipments covered by items 121, 141, 142, and 143 of Exhibit No. 4 to the petition, defendant, for the purpose of computing rates, used its route from Cairo as follows:

Mobile & Ohio R. R. to Meridian, Miss.; thence via Alabama Great Southern R. R. to Birmingham, Ala.; thence via Louisville & Nashville R. R. to Montgomery, Ala.; thence via Central of Georgia Ry. to Columbus, Ga.; thence via plaintiff's line.

On all other shipments listed in Exhibit No. 4 to the petition defendant used for computation of freight rate a route from Cairo as follows:

Mobile & Ohio R. R. to Meridian; thence via Alabama Great Southern R. R. to Birmingham; thence via Louisville & Nashville R. R. to Calera, Ala.; thence via plaintiff's line.

The routes so used by defendant included certain land-aided mileage of the Mobile & Ohio R. R. between Cairo and Meridian, of the Alabama Great Southern R. R. between Meridian and Chattanooga, of the Louisville & Nashville R. R. between Birmingham and Montgomery, of the Central of Georgia Ry. between Montgomery and Columbus, and of the Southern Ry. between Calera, Ala., and Spartanburg, S. C.

The shipments on item 119 of Exhibit No. 4 to the petition, South St. Paul, Minn., to St. Matthews, S. C., on items 21 and 22 from Sioux City, Ia., to Asheville, N. C., on item 69, South St. Paul to Asheville and on item 9, South St. Paul to Ninety Six, S. C., moved via Cairo, Ill. All other shipments moved via junctions other than Cairo, such as Cincinnati or Elkhorn City.

9. The following table shows approximately, in respect to the various items of Exhibit No. 4 to the petition, (a) the

number of miles via route of actual movement, (b) the mileage via plaintiff's rate-making route, (c) the mileage via defendant's rate-making route, and (d) the mileage by which (c) exceeds (a).

There is no satisfactory proof as to excess mileage, if any, with respect to Item No. 134 of Exhibit No. 4 to the petition, on which plaintiff claims $63.42, Item No. 105, $77.40, and Item No. 120, $59.41, and these items are not included in the tabulation.

Item	(a)	(b)	(c)	(d)
1	721. 70	756. 50	1, 178. 45	456. 75
2	1, 491. 20	1, 530. 90	1, 860. 05	368. 85
3	707. 90	742. 70	1. 208. 85	500. 95
4	1, 255. 40	1, 311. 60	1, 777. 75	522. 35
5	1, 255. 40	1, 311. 60	1, 777. 75	522. 35
6	1, 255. 40	1, 311. 60	1, 777. 75	522. 35
7	707. 90	742. 70	1, 208. 85	500. 95
9	1, 513. 00	1, 453. 30	1, 722. 45	209. 45
10	1, 149. 40	1, 287. 20	1, 753. 35	603. 95
11	1, 142. 60	1, 292. 70	1, 758. 85	616. 25
12	1, 149. 40	1, 287. 20	1. 753. 35	603. 95
13	1, 149. 40	1, 287. 20	1. 753. 35	603. 95
14	1, 142. 60	1, 292. 70	1. 758. 85	616. 25
15	1, 627. 70	1, 612. 60	1, 990. 15	362. 45
16	1, 627. 70	1, 612. 60	1, 990. 15	362. 45
17	1, 433. 70	1, 379. 00	1, 801. 55	367. 85
18	740. 60	908. 70	1, 374. 85	634. 25
19	740. 60	908. 70	1, 374. 85	634. 25
20	740. 60	908. 70	1, 374. 85	634. 25
21	1, 411. 80	1, 327. 90	1, 794. 05	382. 25
22	1, 411. 80	1, 327. 90	1, 794. 05	382. 25
23	1, 387. 00	1, 366. 10	1, 788. 05	401. 05
24	765. 00	933. 10	1, 399. 25	634. 25
26	789. 90	958. 00	1, 355. 95	566. 05
27	1, 341. 83	1, 449. 40	1, 644. 95	303. 12
28	1, 355. 50	1, 449. 40	1, 779. 15	423. 65
29	1, 341. 83	1, 449. 40	1, 644. 95	303. 12
30	713. 90	748. 70	1, 214. 85	500. 95
31	716. 60	884. 70	1, 398. 85	682. 25
32	1, 655. 00	1, 634. 10	2, 011. 65	356. 65
33	1, 457. 40	1, 463. 30	1, 793. 05	335. 65
34	985. 20	1, 116. 80	1, 446. 55	461. 35
35	1, 025. 30	1, 193. 40	1, 570. 95	545. 65
36	1, 655. 00	1, 634. 10	2, 011. 65	356. 65
37	1, 333. 50	1, 410. 30	1, 740. 05	406. 55
38	1, 297. 10	1, 383. 70	1, 713. 45	416. 35
39	1, 297. 10	1, 383. 70	1, 713. 45	416. 35
40	985. 20	1, 116. 80	1, 446. 55	461. 35
41	1, 663. 53	1, 527. 70	1, 905. 25	241. 72
42	1, 460. 00	1, 620. 30	1, 901. 75	441. 75
43	1, 655. 00	1, 634. 10	2, 011. 65	356. 65
44	1, 231. 40	1, 292. 70	1, 758. 85	527. 45
46	1, 282. 83	1, 389. 40	1, 719. 15	436. 32
47	1, 282. 83	1, 389. 40	1, 719. 15	436. 32
48	1, 290. 60	1, 383. 90	1, 713. 65	423. 05
49	1, 276. 93	1, 383. 90	1, 713. 65	436. 72
50	1, 388. 60	1, 389. 40	1, 719. 15	330. 55
51	1, 439. 40	1, 445. 30	1, 756. 75	317. 35
52	1, 667. 20	1, 474. 90	1, 804. 65	137. 45
53	1, 382. 40	1, 475. 70	1, 805. 45	423. 05
54	1, 499. 70	1, 539. 40	1, 868. 55	368. 85
55	1, 572. 30	1, 593. 00	1, 917. 15	344. 85
57	1, 525. 60	1, 628. 40	2, 005. 95	480. 35
58	1, 001. 40	1, 036. 20	1, 413. 75	412. 35
59	907. 50	993. 70	1, 459. 85	552. 35

Reporter's Statement of the Case

Item	(a)	(b)	(c)	(d)
60	1,228.43	1,287.20	1,753.35	524.92
61	1,565.50	1,326.60	1,748.55	183.05
62	1,301.20	1,332.10	1,754.05	452.85
63	1,390.30	1,421.40	1,850.15	459.85
64	1,390.30	1,421.40	1,850.15	459.85
67	1,247.90	1,379.00	1,801.55	553.65
68	1,246.20	1,292.70	1,758.85	512.65
69	1,332.60	1,287.20	1,753.35	420.75
70	1,195.60	1,317.10	1,802.83	607.23
71	1,268.53	1,376.10	1,705.85	437.32
72	1,302.80	1,373.40	1,703.15	400.35
73	1,164.20	1,491.70	1,821.45	657.25
74	1,698.63	1,557.80	1,907.15	208.52
78	1,545.30	1,598.90	1,976.45	431.15
79	1,444.60	1,336.50	1,734.45	289.85
80	1,303.33	1,410.30	1,740.05	436.72
81	1,295.00	1,597.70	1,841.05	546.05
82	1,543.70	1,492.90	1,870.45	326.75
83	1,449.90	1,496.40	1,873.95	424.05
84	1,449.90	1,496.40	1,873.95	424.05
85	1,349.40	1,311.60	1,777.75	428.35
86	1,255.40	1,311.60	1,777.75	522.35
87	1,368.60	1,358.90	1,688.65	320.05
88	1,448.70	1,485.00	1,753.35	304.65
89	1,581.90	1,515.60	1,844.75	263.75
90	1,444.60	1,336.50	1,734.45	289.85
91	1,324.60	1,330.90	1,752.85	428.25
92	1,307.30	1,360.90	1,690.65	383.35
93	1,263.50	1,353.40	1,683.15	419.65
94	1,280.00	1,353.40	1,683.15	403.15
95	1,388.30	1,358.90	1,688.65	300.35
96	1,252.80	1,358.90	1,688.65	435.85
98	1,307.30	1,360.90	1,690.65	383.35
99	989.20	1,061.90	1,391.65	402.45
100	1,384.30	1,454.90	1,784.65	400.35
106	1,298.10	1,354.30	1,820.45	522.35
107	1,379.93	1,400.90	1,804.35	424.42
108	1,379.93	1,400.90	1,804.35	424.42
110	1,379.93	1,400.90	1,804.35	424.42
111	1,379.93	1,400.90	1,804.35	424.42
112	1,457.90	1,504.40	2,011.25	553.35
113	1,451.90	1,454.40	1,843.05	391.15
115	1,246.20	1,292.70	1,758.85	512.65
116	1,246.20	1,292.70	1,758.85	512.65
117	1,255.40	1,311.60	1,777.75	522.35
118	721.70	756.50	1,179.05	457.35
119	1,606.70	1,486.20	1,820.90	214.20
121	1,377.70	1,409.60	1,945.75	568.05
122	1,754.50	1,523.10	1,900.65	146.15
123	1,755.50	1,522.10	1,899.65	144.15
124	1,755.50	1,522.10	1,899.65	144.15
125	1,228.43	1,287.20	1,753.35	524.92
126	1,584.80	1,517.00	1,847.95	263.15
127	1,566.50	1,499.10	1,828.25	261.75
128	1,507.06	1,498.70	1,793.65	286.59
129	1,310.50	1,357.00	1,825.95	515.45
130	1,390.30	1,421.40	1,850.15	459.85
131	1,337.10	1,573.50	1,941.25	604.15
132	1,657.80	1,516.60	1,894.15	236.35
133	1,657.80	1,516.60	1,894.15	236.35
135	1,247.90	1,379.00	1,801.55	553.65
136	1,247.90	1,379.00	1,801.55	553.65
137	1,340.73	1,447.70	1,777.45	436.72
138	1,229.60	1,325.40	1,747.95	518.35
139	1,547.70	1,512.40	1,745.45	197.75
140	1,247.90	1,379.00	1,801.55	553.65
141	1,347.70	1,394.40	1,927.75	580.05
142	1,361.50	1,317.00	1,951.25	589.75
143	1,361.50	1,317.00	1,951.25	589.75
145	1,001.40	1,036.20	1,413.75	412.35
146	1,001.40	1,036.20	1,413.75	412.35
147	1,001.40	1,036.20	1,413.75	412.35

10. All the shipments covered by Exhibit No. 4 to the petition consisted of livestock, moved from drought-stricken areas to grazing lands in the South where it was possible for them to subsist. The number of cars in each shipment ranged from 1 to 19, with an average of 5 cars to a shipment.

The routes used by defendant for land-grant deduction purposes south of Cairo in computing net freight rates are not used by or for commercial traffic.

A map showing the land-grant lines south of Cairo, insofar as herein involved, routes used by plaintiff, routes used by the defendant, and alternative routes used by neither, applicable to the shipments listed in Exhibit No. 4 to the petition, and bearing on its face a legend identifying the various routes, is filed in the case as plaintiff's Exhibit No. 26 and is made part hereof by reference.

The routes used by defendant in its calculations would have required, if the livestock had actually moved over them, two or three stops for feed, water, and rest, additional to those required on the route in fact traversed, and a minimum of three additional days in transit. The extra cost of feeding would have had to be borne by the shipper.

The livestock was shipped during July, August, and September, at a time of year that is hard on livestock in cattle cars.

The carriers' tariff requirements were for 200 pounds of feed per car for cattle at each stop for rest, feed, and water. The cost to defendant would have been in the neighborhood of $2.50 for 200 pounds of hay.

There are alternative routes not made use of either by plaintiff or by defendant, that would result in less net freight charges than claimed by plaintiff, and higher net freight charges than conceded by defendant. There is no evidence of any particulars with respect thereto.

11. If the routes used by defendant in calculation of net freight charges on Exhibit No. 4 to the petition are applicable under the Freight Land-grant Equalization Agreement there are due the defendant overpayments made by it to plaintiff on items (not now waived by plaintiff), of the exhibit in certain several amounts as follows:

Item:	Due	Item:	Due	Item:	Due
1	$7.48	67	$43.02	117	$9.31
3	7.09	68	104.71	118	7.37
4	8.32	69	7.49	120	45.08
5	7.91	78	38.38	121	60.27
11	11.23	79	41.62	122	49.78
13	43.48	81	3.50	123	8.18
15	9.79	82	12.54	124	8.09
16	4.21	83	13.96	129	23.95
17	41.75	84	14.42	130	7.99
18	5.29	85	94.51	131	6.31
19	25.75	86	21.81	132	7.81
21	47.25	90	65.36	133	10.91
22	35.43	91	6.68	134	48.73
24	2.74	95	4.12	135	7.57
26	59.63	96	14.53	136	7.57
30	10.05	98	4.34	139	.84
32	9.83	105	15.79	140	6.65
36	14.73	106	56.74	141	1.02
41	13.57	107	18.82	142	13.90
42	10.13	108	14.94	143	21.88
43	10.28	110	6.76	145	10.01
57	3.66	111	6.89	146	10.01
58	47.98	112	3.70	147	50.02
63	6.63	113	15.36		
64	19.92	116	16.19		
Total					1,533.56

On the same basis there are the following underpayments to plaintiff:

Item:	Due
7	$4.53
35	8.35
Total	12.88

The difference is an overpayment to plaintiff of $1,520.68, on items not now waived.

The net overpayment by defendant to plaintiff on the items sued on in the first cause of action, including some of those now waived by plaintiff, is $1,618.41 if the route used by defendant is held to be correct under the terms of the equalization agreement. Defendant makes counterclaim for this overpayment.

SECOND CAUSE OF ACTION

Tennessee Valley Authority

(Exhibit No. 8 to the Petition)

12. Between July 24, 1934, and February 17, 1938, on behalf of the Tennessee Valley Authority, a duly authorized agency of the United States, there were shipped over plaintiff's lines and its connections 227 shipments of various kinds of Government property from and to the points listed in Exhibit No. 8 to the petition. All of these shipments were transported on Government bills of lading and were delivered by plaintiff in accordance therewith.

13. For the transportation service so rendered plaintiff submitted its bills on which it claimed freight charges totaling $8,984.69, of which amount defendant paid plaintiff $7,467.48, leaving a balance of $1,517.21 unpaid, as set forth in Exhibit No. 8 to the petition.

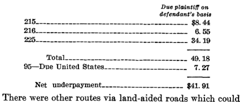
Plaintiff now limits its claims to the following items of the exhibit, in the amounts indicated, and abandons claim as to all other items of the exhibit:

Item:	*Claim*	Item:	*Claim*	Item:	*Claim*
12	$19.26	59	$3.73	113	$0.66
14	9.63	64	1.02	114	5.16
15	1.13	65	11.40	115	1.10
20	1.03	66	1.96	118	2.40
21	8.87	75	34.84	123	.85
26	14.26	77	.31	124	2.18
29	2.26	78	5.33	125	1.52
30	.70	79	.38	126	1.23
34	.72	80	.73	127	1.25
35	.91	81	1.10	128	.46
36	1.33	82	1.40	133	.55
37	1.69	83	1.73	134	.54
39	14.90	86	28.00	135	1.03
40	10.65	87	32.64	136	1.47
41	1.06	88	27.34	137	.53
46	2.86	100	1.33	140	.44
54	3.36	101	.44	144	.19
55	2.32	102	.90	145	1.63
56	2.70	103	.43	146	.42
57	.65	104	2.97	147	2.55
58	.70	105	3.30	149	2.21

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Item:	Due	Item:	Due	Item:	Due
150	$1.77	179	$1.48	206	$0.80
151	.29	182	.43	209	19.82
152	.55	184	.78	212	1.27
153	.28	185	20.13	213	10.02
159	16.27	187	10.45	214	7.00
162	75.04	188	16.33	215	26.14
163	61.58	190	.22	216	22.81
164	13.42	191	1.65	217	28.89
166	3.42	195	.47	218	2.99
167	2.07	196	1.08	219	1.28
168	.38	197	1.00	220	33.51
169	.37	198	2.63	221	18.22
170	.66	199	1.61	222	33.90
171	2.55	200	33.61	223	17.94
172	.60	201	.69	224	18.19
173	.74	202	3.88	225	103.45
175	35.87	203	1.78	226	10.91
177	44.32	204	1.50	227	33.15
178	1.92	205	.39		
Total					1,043.14

On the basis of settlement employed by defendant in payment, plaintiff has been underpaid by defendant, as shown on defendant's exhibit E, the net sum of $41.91, distributed in items of Exhibit No. 8 to the petition as follows:



	Due plaintiff on defendant's basis
215	$8.44
216	6.55
225	34.19
Total	49.18
95—Due United States	7.27
Net underpayment	$41.91

There were other routes via land-aided roads which could have been used as a basis for calculation of net freight charges, with resulting calculations of net charges less than herein claimed by plaintiff and more than herein claimed by defendant. Full particulars with regard to such routes and resulting charges are not in evidence.

There is no satisfactory evidence of record with respect to item No. 188 in the amount of $16.33, and no further finding with respect thereto is made herein.

14. The shipments listed as items 12, 14, 15, 20, 21, 26, 29, 30, 34, 35, 36, 37, 39, 40, 41, 46, 54, 55, 56, 57, 58, 59, 64, 65, 66, 77, 78, 79, 80, 81, 82, 83, 100, 101, 102, 103, 104, 105, 113, 114, 115, 118, 123, 124, 125, 126, 127, 128, 133, 134, 135, 136, 137, 140, 144, 145, 146, 147, 149, 150, 151, 152, 153, 159, 172, 173, 179, 182, 185, 190, 191, 195, 196, 197, 198, 204, 205, 206, 209, 212, moved from Sheffield, Alabama, to Corinth, Mississippi, over plaintiff's line, a distance of 54.3 miles, being a route not aided by land grants. The total claim on these items is $241.19. Plaintiff billed its charges against defendant at full commercial rates, and now claims such rates. The defendant in payment deducted from plaintiff's bills $241.19. In arriving at this deduction defendant used the following route for purpose of land-grant deduction: Sheffield to Parrish, Ala., via Northern Alabama Ry.; thence to Birmingham, Ala., via plaintiff's line; thence to Meridian, Miss., via Alabama Great Southern R. R.; thence via Mobile & Ohio R. R. to destination, a distance of 484.82 miles. The land-grant lines on the route used by defendant for equalization purposes were from Birmingham to the Alabama-Mississippi State Line and from Meridian to Corinth.

Commercial shipments do not move from Sheffield to Corinth by way of the route used by defendant.

There are certain alternative land-grant routes from Sheffield to Corinth used neither by plaintiff nor by defendant in their calculations, which would result in higher net charges than paid by defendant and lower net charges than those contended for by plaintiff. These alternative routes are illustrated by the map in evidence as plaintiff's Exhibit No. 42, made a part hereof by reference, the lines depicted in red being the land-aided roads. The alternative routes are not used by commercial traffic.

15. The shipments covered by items Nos. 166, 167, 170, 171, 184, 199, and 200 of Exhibit No. 8 to the petition, moved from Corinth to Sheffield over plaintiff's line, 54.3 miles. The differences thereon, claimed herein, total $44.70. Plaintiff billed for the full commercial rate. Defendant deducted therefrom $44.70 in settlement, using a land-grant equalization route as in the case of shipments in the reverse direction,

Sheffield to Corinth, *supra*, Finding No. 14, and the findings therein made apply in both directions.

16. The shipments listed as items 164, 168, 169, 217, 218, 219, 226 of Exhibit No. 8 to the petition, on which a total of $58.24 is claimed, moved from Sheffield to Decatur, Ala., entirely by way of the Southern Railway, a distance of 44.1 miles, non-land-grant; and plaintiff billed without land-grant deduction, and now claims full commercial charges are proper. The defendant, in paying for the transportation and making the deduction of $58.24, used a route as follows: Sheffield to Parrish via Northern Alabama Railway; Parrish to Birmingham via Southern Ry.; Louisville & Nashville R. R. beyond to destination. The Louisville & Nashville R. R. portion is land-aided. The through distance over the route so used is 222.4 miles, and this route is not used by commercial traffic.

17. The shipments covered by items Nos. 220, 221, 222, 223, 224, 227, a total difference in dispute of $154.91, moved via the Southern Ry. from Decatur to Sheffield, Ala.

The circumstances here are the same as set forth in Finding No. 16, with directions reversed.

18. The shipments on items 86, 87, and 88 were from Chicago, Illinois, to Coal Creek, Tennessee. The aggregate claimed thereon is $87.98. The shipments actually moved by way of the Chicago, Burlington & Quincy R. R. to Paducah, Ky.; Nashville, Chattanooga & St. Louis Ry. to Nashville; Tennessee Central Ry. to Harriman; thence via Southern Railway to Coal Creek, a total distance of 875.2 miles.

In billing defendant the plaintiff offered net freight charges calculated by way of Cairo, Hopkinsville, Nashville, Lebanon, Harriman, the land-aided portion of which extended only from Chicago to Cairo on the Illinois Central R. R., a total distance from Chicago to Coal Creek of 760.7 miles. The defendant's deduction of $87.98 from plaintiff's bill was calculated by using the Cairo gateway, as had the plaintiff. The route used beyond Cairo was different. Defendant used the Mobile & Ohio R. R., Cairo to Meridian, the Alabama Great Southern R. R. to Chattanooga, and the Southern Ry. thence to destination. The land-grant portion of the route so used extended from Chicago to Cairo, the Tennessee-Mississippi State Line to Meridian, and the Alabama-Mississippi State

Line to the Alabama-Georgia State Line, a through distance from Chicago to Coal Creek of 1,172.05 miles.

The route made use of by defendant in its calculation is not employed in commercial traffic.

There were alternative routes beyond Cairo, not employed by either party, which would result in higher charges than contended for by defendant, and lower than claimed by plaintiff. Commercial shipments do not use the alternative routes. They are illustrated by plaintiff's Exhibit No. 44, which is made part hereof by reference, and not further particularized.

19. The shipment covered by item 177 of Exhibit No. 8 to the petition moved from Iuka, Miss., to Chattanooga, over plaintiff's line. There is claimed on this item $44.32. The distance is 200.5 miles, without land-grant mileage, and the gross commercial charge was billed against defendant. In making payment defendant deducted $44.32, using therefor a land-grant route as follows: Southern Ry. to Corinth (non-land-grant) 22.3 miles; Mobile & Ohio R. R. to Meridian (land-grant) 194.12 miles; Alabama Great Southern R. R. to Chattanooga (land-grant Alabama-Mississippi State Line to Alabama-Georgia State line) 298.9 miles, a total distance of 513.32 miles. The land-grant route, so constructed, is not used by commercial traffic.

There are alternative routes from Iuka to Chattanooga involving land grants that would if used in the calculation result in lower charges than asserted by plaintiff and in higher charges than here computed by defendant. These alternative routes are indicated in plaintiff's Exhibit No. 40, which is made part hereof by reference. They are not routes used by commercial traffic, and are not further evidenced by particulars.

20. The shipments covered by items Nos. 175, 178, 187, 201, 202, 203, 213, and 214 in Exhibit No. 8 to the petition, moved from Corinth, Miss., to Paint Rock, Ala., over plaintiff's line, a non-land-grant route, a distance of 143.4 miles. The difference deducted and claimed aggregates $71.61. Plaintiff billed at full commercial rates. Defendant applied a land-grant route for equalization purposes as follows: Corinth to Meridian via Mobile & Ohio R. R. (land-grant) 194.12 miles; Meridian to Chattanooga via Alabama Great South-

ern R. R. (land-grant Alabama-Mississippi State Line to Alabama-Georgia State Line) 298.8 miles; Chattanooga to Paint Rock via Southern Ry. (non-land-grant) 79.4 miles, a through distance of 572.32 miles.

No commercial shipments move by way of the route used by defendant.

There are alternative land-grant routes that would result in lower charges than claimed by plaintiff and higher than those paid by defendant. These alternative routes are not used by commercial traffic.

Plaintiff's Exhibit No. 46, made part hereof by reference, illustrates these alternative routes in yellow lines. They are not the subject of further particulars.

21. The shipments listed in items 75, 162, 163 of Exhibit No. 8 to the petition moved from Memphis, Tenn., to Sheffield, Ala., entirely over plaintiff's non-land-grant line, a distance of 147.2 miles. Plaintiff billed the Government at full commercial charges, from which the Government in payment deducted $171.46 by way of land-grant equalization.

The shipment on item No. 75, $34.84, consisted of wrought-iron pipe. For land-grant equalization purposes defendant used the following route: Memphis to Meridian via Mobile & Ohio R. R., 287.02 miles (land-grant Corinth to Meridian); Meridian to Birmingham via Alabama Great Southern R. R., 153.3 miles (land-grant Alabama-Mississippi State Line to Birmingham); Birmingham to Parrish via Southern Ry. (non-land-grant) 42.1 miles; Parrish to Sheffield via Northern Alabama Ry. (non-land-grant) 95.3 miles, a through mileage of 577.72 miles.

On items Nos. 162 and 163, $136.62, the shipments consisted of various articles. The defendant, for land-grant equalization purposes, used a route as follows: Memphis to Meridian, via Mobile & Ohio R. R., 287.02 miles (land-grant Corinth to Meridian); Meridian, Miss., to Attalla, Ala., via Alabama Great Southern R. R., 209.2 miles (land-grant Alabama-Mississippi State Line to Attalla); Attalla to Sheffield via Southern Ry. (non-land-grant) 306.1 miles, total distance 802.32 miles.

Commercial shipments do not move over the routes used by defendant in its calculations.

22. On items 215 and 216 of Exhibit No. 8 to the petition the shipments were from Decatur, Ala., to Margerum, Ala., a distance of 67.5 miles over plaintiff's line, by which they actually moved. This was a non-land-grant route and plaintiff billed at full commercial rates, i. e., without land-grant deduction. In payment defendant deducted $48.95 on account of land-grant equalization, arriving at this deduction by use of the following route: Decatur to Birmingham via Louisville & Nashville R. R., 85 miles (a land-aided road); Birmingham to Parrish via Southern Ry., 42.1 miles (non-land-grant); Parrish to Sheffield via Northern Alabama Ry., 95.3 miles (non-land-grant); Sheffield to Margerum via Southern Ry., 23.6 miles (non-land-grant), a total distance of 246 miles.

The route so used by defendant is not in use by commercial traffic.

For further matter in connection with these items see Finding No. 13, *supra*.

23. Item 225 of Exhibit No. 8 to the petition covers a shipment from Margerum to Decatur, Ala., difference of $103.45.

The same facts are present in regard to this item as in regard to items Nos. 215 and 216 described in Finding No. 22, *supra*, with directions reversed.

For further matter in connection with this item see Finding No. 13.

THIRD CAUSE OF ACTION

Department of the Treasury

Department of War

Department of Agriculture

(*Exhibit No. 9 to the Petition*)

24. In the year 1936 duly authorized representatives of defendant shipped over plaintiff's lines of railway and those of its connections certain Government property from Springfield, Ohio, to Gainesville, Ga., from Kansas City, Mo., to Ft. McClellan, Ala., and from Springfield, Ohio, to Sumter, S. C., on Government bills of lading, and the shipments so consigned were delivered by plaintiff in accordance with the billing.

The items are listed by number in Exhibit No. 9 to the petition, and those now claimed are as follows, all other items being abandoned by plaintiff:

Treasury—	
Item 24, Springfield to Sumter	$144.19
War—	
Items 21 and 22, Kansas City to Ft. McClellan	42.60
Agriculture—	
Item 5, Springfield to Gainesville	137.98
Total	324.77

The amount of $324.77 represents deductions made by defendant from freight charges billed and claimed by plaintiff for the transportation performed.

The deductions were erroneously made under paragraph 3 (b) of the freight equalization agreement and defendant concedes that plaintiff is entitled to recover the said sum of $324.77.

The court decided that the plaintiff was entitled to recover the sum of $386.83 and that the defendant, on its counterclaim, was entitled to recover the sum of $1,638.56, and that judgment should be entered for the defendant for the difference, $1,251.73.

LITTLETON, *Judge*, delivered the opinion of the court:

The pertinent provisions of Paragraphs 1 and 2 (a) of the Land-grant Equalization Agreement are set forth in finding 2. The dispute concerns only the selection of land-grant routes for the purpose of determining the proper freight charges to the defendant under the terms of this agreement for government shipments made over plaintiff's lines and its connections. Plaintiff was not a land-grant railroad and it was for this reason that it entered into the equalization agreement referred to. The question in issue is, did the agreement between the parties provide for or require freight charges to the government for transportation of the shipments of government property over the actual routes of movement based upon lawful rates on file with the Interstate Commerce Commission, less deductions for land-grant over the land-aided or land-grant routes affording the lowest net rates, or on some other basis.

The parties stipulate that "The sole issue presented in the first cause of action involves the determination of an available land-aided route south of Cairo, Ill., in accordance with the terms of the plaintiff's freight land-grant equalization agreement, for the purpose of establishing in pertinent part charges for transporting the shipments, listed in said Exhibit 4 to the petition, over the actual routes of movement." As to the second cause of action, the parties stipulate that "There is no controversy respecting the amount of the commercial rates used by the plaintiff and the defendant, nor is there any dispute as to the fact that the net amounts indicated by the defendant as properly payable have been computed correctly over the land-aided routes used by the defendant as a basis for such payments. The sole issue is the selection of an available land-aided route, if any, in accordance with the terms of the plaintiff's freight land-grant equalization agreement, for the purpose of establishing charges for transporting the shipments, listed in Exhibit 8 (to the petition), over the actual routes of movement."

The third cause of action has been settled by stipulation and presents no controversy. See Finding 24.

The provision of the agreement in question seems plain enough without resort to construction when it is interpreted according to the ordinary signification of the language used, but plaintiff contends that under a proper construction of the agreement based on what it contends was the intention of the parties, it agreed only to equalize net freight rates computed via *competitive* routes, that is, routes which are in fact competitive in the ordinary commercial sense, and that it did not agree and is not required to equalize to the government net rates computed in each case via the land-grant route from point of origin to destination in fact producing the lowest net rate, regardless of whether such route is in fact commercially competitive and regardless of how circuitous and impractical it may be. In addition plaintiff asks the court to define the term "competitive routes." The unambiguous language of the equalization agreement expresses the final intention of the parties as to the routes and rates and the legal import of such language is opposed to plaintiff's contention. Simply stated, the plaintiff by Paragraph 1 of the equali-

zation agreement stipulated without qualification or exception to accept for the transportation of government property the lowest net rates lawfully available over land-aided routes. By its express terms the agreement prescribed this measure of reduced commercial tariff rates to the equalizing carrier as the basis for computing freight charges for the transportation of government property over the actual route of movement. Except as reflected in the adjustments in defendant's counterclaim, the net freight charges due plaintiff were computed by defendant over land-grant routes lawfully available. The land-grant routes so selected and used for computation of rates by defendant under lawful tariffs on file with the Interstate Commerce Commission were admittedly available to the commercial public and to the government and could have been used for the making of all of the shipments in question. Beyond this the equalization agreement is silent as to the extent to which the land-grant routes to be selected must be commercially competitive or practical or as to the extent or limit of circuity of the land-aided routes which may be used to determine "the lowest net rates lawfully available." Paragraph 2 of the agreement provided for exceptions and none that is pertinent here was made. It is not for the court to supply by construction the exceptions and limitations for which plaintiff contends when the agreement as written by clear and definite language specified, without qualification or restriction, the basis for determining the extent of the government's obligation for services rendered thereunder. Plaintiff seeks by construction to engraft upon the language of the contract a term or condition, i. e. "via competitive routes," which is not expressly or by necessary implication included therein. Compare *Louisville & Nashville R. R.* v. *United States*, 61 C. Cls. 1, in which the agreement provided for land-grant deductions "via the longest land-grant mileage * * * over usually traveled routes." With reference to competition and circuity of routing as to which the plaintiff's agreement is silent, it should be pointed out that a route which is competitive for commercial traffic may or may not be competitive for government traffic which is subject to reduced rates over lawfully available land-grant routes. In the transportation of government property the

competition for it is between the non-land-grant or equalization agreement carriers. A land-grant route which the government might regard as entirely adequate for shipment of its property might not be regarded as a practical route over which commercial shippers not entitled to freight rate reductions ordinarily would elect to make their shipments. However, circuity routing is a well known factor in connection with transportation rates and is favored by carriers to secure traffic and by shippers to meet particular situations. These matters were well known to the parties when the equalization agreement was made, and they knew also that, according to custom, there was no mileage or distance limitation in any of the tariffs which fixed routes and rates lawfully available to the government as well as to the public, and they made none in the equalization agreement. Neither did the equalization agreement make any reference to the allowable percentage of circuity from point of origin to destination in determining deductions on account of land-grant distances. Under the agreement the lowest net rate lawfully available as derived through land-grant deductions is not conditioned in any case upon the character of the property shipped. The formula for determining the freight rate which plaintiff agreed to accept is definitely set forth whether the property shipped be cattle or steel.

It would appear from the Regulations of the Quartermaster General, U. S. Army, issued in 1916 and existing at the time the agreement in question was made (see also Act of July 5, 1884, 23 Stat. 107, 111), that any general or special limitation or qualification such as that for which plaintiff now contends was purposely left out of plaintiff's stipulation "to accept the lowest net rates lawfully available" to the Government over available land-grant routes. Those Regulations (Manual for the Quartermaster Corps, U. S. Army, 1916, App. No. 9, Vol. 2, p. 223; Quartermaster General Circular No. 15, May 18, 1922), provided in part as follows:

> Particular attention is invited to the special exceptions of certain carriers to both passenger and freight agreements. Where these special exceptions provide that the carriers shown in the margin will not equalize

> the lowest net rates available on certain specified traffic, such traffic should not be forwarded via the carriers shown, unless no other route is available. Where special exceptions provide that lowest available rate will not be protected via certain routes, such routes should not be used.

We cannot amend the agreement which the parties themselves elected to make, by undertaking to prescribe qualifications as to distance or percentage of circuity of available land-grant routes. As written, the equalization agreement is easily understood and simple of administration, and the language used discloses that this was intended as one of the main objects of the agreement, whereas the construction for which plaintiff contends would unavoidably result in uncertainty, confusion, and constant controversy, as the facts in this case so clearly demonstrate. In between the routes used by defendant and the routes used by plaintiff, there are many alternative routes. Which shall be chosen if we depart from the clear and definite language of the equalization agreement which gives the government "the lowest net rates lawfully available * * * from point of origin to destination at time of movement"? The answer as to what other routes should be used can not be found in the equalization agreement and is impossible on the record as it stands, and probably never could be arrived at, either administratively or judicially, with any degree of satisfaction without a detailed and expert inquiry into each case and the adoption of an arbitrary allowable percentage of circuity. We can find no justification or authority in the language or intention of the agreement for the selection by the court of some intermediate available route which produces a higher net freight rate to plaintiff than the "lowest net rate lawfully available, as derived through deductions account of land-grant distance from the lawful rates filed with the Interstate Commerce Commission applying from point of origin to destination." Any question as to whether it is unfair and unreasonable to require plaintiff to equalize net charges computed at lawful tariff rates via the land-grant routes used by defendant is foreclosed by the tariffs lawfully on file with the Interstate Commerce Commission. The question of reasonableness of

tariff rates and routes is one over which this court has no jurisdiction. It has been committed by Congress to the Interstate Commerce Commission.

Under the equalization agreement and the routing instructions of the applicable lawful tariffs the defendant has, as shown by the findings, overpaid plaintiff a total of $1,638.56 on certain items of shipments and underpaid it a total of $386.83 on other items, or a net overpayment of $1,251.73, for which counterclaim is made. See findings 11, 13, and 24.

The amount of $386.83 which plaintiff is entitled to receive is less than the amount of the overpayment to it for which the defendant is entitled to recover $1,638.56 on its counterclaim. Judgment will therefore be entered in favor of the defendant for the difference of $1,251.73. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

KINGAN & CO., INCORPORATED, v. THE UNITED STATES

[No. 45275. Decided October 4, 1943]

On the Proofs

Government contract; yardage and feeding charges under Government Relief Program for processing and distributing meat.—Decided upon the authority of *John Morrell & Company* v. *United States*, 94 C. Cls. 490.

The Reporter's statement of the case:

Mr. Paul F. Myers for plaintiff. *Mr. James Craig Peacock* was on the brief.

Mr. Grover C. Sherrod, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

Plaintiff seeks to recover $4,439.62 admittedly due for canned roast beef delivered to and accepted by defendant under a contract of September 5, 1934.

The defense originally interposed by defendant and later withdrawn was that it was entitled to an offset in this amount for an alleged erroneous payment for yardage and feeding of cattle and sheep slaughtered.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff, a New Jersey corporation entered into a contract September 5, 1934, with defendant through the latter's agent, the Federal Surplus Relief Corporation, which later changed its name to Federal Surplus Commodities Corporation, for the slaughter and processing of cattle from drought areas. A copy of the contract, omitting immaterial parts, is exhibit A to the plaintiff's petition and is made a part of this finding by reference.

2. June 29, 1935, plaintiff in due course submitted invoices 95–1K and 95–2K aggregating $6,493.50 for canned roast beef that day delivered to and accepted by defendant under the contract. By later adjustments mutually agreed to, this sum was reduced to $5,497.41. Of this $1,057.79 was paid; the balance, $4,439.62, was not paid because of a claim in the same amount asserted by Federal Surplus Commodities Corporation against Kingan & Company.

3. The claim so asserted by Federal Surplus Commodities Corporation against plaintiff was based on allegedly erroneous payments made the latter under five contracts for the slaughter and processing of cattle and sheep from drought areas, being contracts numbered, respectively, FSR–528, Schedule 64, June 6, 1934; FSR–576, Schedule 69, July 5, 1934; FSR–648, Schedule 78, August 4, 1934; FSR–808, Schedule 95, September 5, 1934; and FSR–864, Schedule 94, September 5, 1934. The $1,396.06 so paid plaintiff was for feeding those cattle and sheep received from day to day by it which either did not exceed the daily quotas provided for in the contracts or were not in excess of the number slaughtered daily pursuant thereto; $3,043.56 also paid was for yardage for the cattle and sheep which, pursuant to the terms and provisions of said contracts, were slaughtered and processed by plaintiff. The asserted claim is set forth in joint exhibit A and also in defendant's counterclaim filed herein

on July 8, 1942, as amended November 4, 1942, to which reference is hereby made. The amended counterclaim was, by leave of court first had and obtained, withdrawn by defendant February 24, 1943, for the reason that on full investigation it was ascertained that the United States, with respect to the asserted claim aggregating $4,439.62, was in the same category as was an identical claim asserted in the case of *John Morrell & Company* v. *The United States*, 94 C. Cls. 490, all as set forth in defendant's memorandum filed herein February 17, 1943, which is made a part hereof by reference.

4. September 24, 1937, plaintiff submitted to Federal Surplus Commodities Corporation its claim for the aforesaid $4,439.62 under the contract of September 5, 1934, together with other claims not material in this suit.

5. October 18, 1937, Federal Surplus Commodities Corporation forwarded the claim to the General Accounting Office for settlement, without recommendation or certification.

6. By settlement dated November 17, 1939, the General Accounting Office disallowed the aforesaid claim. This action was affirmed by the Acting Comptroller General under date of April 26, 1940.

7. Plaintiff's claim herein is restricted solely to the sum of $4,439.62 due under the contract of September 5, 1934, and withheld by the Federal Surplus Commodities Corporation as set out in finding 2 hereof, no part of which has been paid.

The court decided that the plaintiff was entitled to recover, in an opinion *per curiam*, as follows:

The amount of $4,439.62 claimed by plaintiff represents an amount admittedly due it under the contract of September 5, 1934, for canned roast beef, but payment of the amount was withheld by defendant on the ground of alleged overpayment to plaintiff of $3,043.56 for yardage for cattle and sheep slaughtered, and $1,396.06 for feeding cattle and sheep received from day to day by plaintiff which either did not exceed the daily quotas provided for in contracts with defendant or were not in excess of the number slaughtered each day.

The defendant first filed a counterclaim in this suit for the alleged overpayments to plaintiff, but, after the decision in this court in *John Morrell & Company* v. *United States*, 94 C. Cls. 490, defendant, upon application to and by leave of the court, withdrew this counterclaim.

Upon the facts and the provisions of the contracts between the parties in this case, the question presented is governed by the decision of this court in *John Morrell & Company*, *supra*, and judgment will be entered in favor of plaintiff for $4,439.62. It is so ordered.

JOE N. COLE v. THE UNITED STATES

[No. 45295. Decided October 4, 1943]

On the Proofs

Pay and allowances; Medical Reserve officer, United States Army, on active duty at Civilian Conservation Corps camp entitled to adequate quarters as provided by statute.—Where plaintiff, a bachelor officer in the Medical Administration Corps Reserve, United States Army, on active duty with the Civilian Conservation Corps, was not assigned to quarters and was not paid rental allowance in lieu of quarters; it is *held* that plaintiff is entitled to recover for the period from September 1, 1935, to July 22, 1937.

Same; Army regulations under Act of May 31, 1924.—The statute of May 31, 1924, contemplated that an Army officer be assigned for his personal use the number of rooms provided by law and that such quarters should be adequate for his exclusive occupancy; and the Army regulations made in accordance with the statute provided that adequate quarters be assigned.

Same; decision of Secretary of War as to adequacy of quarters at Civilian Conservation Corps camps.—Where the Secretary of War (in War Department Regulations, Changes No. 4, June 24, 1935) determined that "in view of the improved conditions of quarters now [then] prevailing at Civilian Conservation Corps work camps," shelter furnished at such camps for personal use to Army officers, without dependents, constituted "adequate quarters" as contemplated by law, the Secretary of War did not decide, or intend to decide, that a less number of rooms than the number provided by law for a commissioned officer would be adequate quarters, unless so determined by a competent superior authority in a particular case.

Same; laches.—Where plaintiff on December 6, 1939, in accordance with Army Regulations 210–70 bj (2), August 20, 1934, filed his claim with the Corps Area Commanding General for rental allowance for the periods June 1 to July 22, 1935, and September 1, 1935, to July 22, 1937; it is *held* that the defense of laches is not well founded, since under the Regulations of August 20, 1934, it is not mandatory that the officer concerned appeal to the Corps Area Commander as a condition of his right to claim rental allowance provided by statute.

The Reporter's statement of the case:

Mr. Fred W. Shields for plaintiff. *King & King* were on the brief.

Mr. Wilbur R. Lester, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant. *Mr. Milton Kramer* and *Mr. E. Leo Backus* were on the brief.

In this case plaintiff, a first lieutenant in the Medical Administration Corps Reserve, United States Army, from April 13, 1935, to April 28, 1939, and a captain from the last-mentioned date, sues under the act of June 10, 1922, as amended by the act of May 31, 1924, to recover rental allowance of $909.33 provided by law for a bachelor officer of his grade and rank without dependents for the period September 1, 1935, to July 22, 1937.*

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. August 11, 1931, plaintiff was appointed a second lieutenant in the Medical Administration Corps Reserve, United States Army, which appointment he accepted August 18, 1931. April 13, 1935, he was promoted to first lieutenant, accepting the appointment April 22, 1935, and on April 28, 1939, he was promoted to captain, accepting the appointment April 29, 1939, which rank he now holds. Plaintiff, at the times hereinafter mentioned, was a bachelor officer.

2. May 23, 1935, plaintiff reported for a two months' tour of active duty with the Civilian Conservation Corps at Fort Bragg, North Carolina, pursuant to paragraph 2 of Special Orders No. 95, Headquarters, Fourth Corps Area, dated May 18, 1935.

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* 42 Stat. 625; 43 Stat. 250.

July 13, 1935, his assignment to active duty was extended for a period of six months by paragraph 2, Special Orders No. 95, Civilian Conservation Corps, Fort Bragg, North Carolina. December 31, 1935, his assignment to active duty was again extended for a period of six months by paragraph 7, Special Orders No. 208, Headquarters District "A," Civilian Conservation Corps, Fort Bragg, North Carolina; and on July 6, 1936, his assignment to active duty was again extended for a period of six months by paragraph 4, Special Orders No. 152, Headquarters District "A," Civilian Conservation Corps, Fort Bragg, North Carolina.

3. During the entire period from May 23, 1935, to July 22, 1937, while plaintiff was assigned to and performed active duty with the Civilian Conservation Corps, he was stationed at Fort Bragg, North Carolina.

4. Plaintiff reported for duty at Fort Bragg, May 23, 1935, but was not given any written assignment to quarters. Instead, he was given verbal instructions by the Commanding Officer of the Supply Company of the Post to occupy quarters in a building formerly used as bachelor quarters for officers of the Regular Army but which had been turned over to the Civilian Conservation Corps. The quarters occupied by plaintiff consisted of a room approximately 13 x 14 feet, with adjoining bath, in a steam-heated two-story building.

The quarters in the building were divided into suites of two rooms, with a bath for each two suites. They were unfurnished, except for Army cots.

This building was the property of the Regular Army and was turned over to the Civilian Conservation Corps during the spring of 1935. Prior to its being turned over to the Civilian Conservation Corps, the building was occupied by bachelor officers of the Regular Army.

The building was used as Civilian Conservation Corps work camp quarters for officers who were ordered to active duty with the Civilian Conservation Corps and assigned to duty at that station and was also used to quarter casual officers located temporarily at Fort Bragg in connection with their Civilian Conservation Corps activities.

5. The plaintiff occupied these quarters from May 23 to July 31, 1935, during which time he shared the two-room suite

with from one to as many as five or six officers. There was an average of three to four officers, including himself, occupying this two-room suite during the period from June 1 to August 1, 1935.

During the initial portion of his occupancy from May 23 to June 1, 1935, plaintiff was paid rental allowance.

6. These quarters were noisy and overcrowded. Plaintiff at the time was working long hours and was unable to obtain sufficient rest. He protested orally several times to his commanding officer about the inadequacy of the quarters furnished him, and his commanding officer promised to take the matter up with the commanding general. Finally, on August 1, 1935, plaintiff was orally advised by his commanding officer that the commanding general had given him permission to vacate the quarters and move into the nearby town of Fayetteville, North Carolina, and draw rental allowance.

Plaintiff accordingly vacated his quarters that night and rented quarters at his own expense in Fayetteville, which quarters he continued to occupy until July 6, 1937.

7. Plaintiff was paid rental allowance during the month of August 1935. Thereafter he received no rental allowance. He was informed that it had been discontinued in accordance with Changes No. 4, War Department Regulations, June 24, 1935, reading as follows:

> 45. *Availability of public quarters for Army personnel at work camps.*—a. Under the authority vested in him by the Act of March 4, 1915 (38 Stat. 1069), and in view of the improved conditions of quarters now prevailing at Civilian Conservation Corps work camps, the Secretary of War has determined that shelter furnished for personal use at such camps to commissioned and warrant officers who have no dependents constitutes adequate quarters as contemplated by law.
>
> b. Hereafter, commanding officers of Civilian Conservation Corps work camps, who, under the provisions of AR 210–70, are charged with the assignment and termination of assignment of quarters, will be guided in their determination as to availability of public quarters by the foregoing decision of the Secretary of War.

Plaintiff protested the discontinuance of rental allowance through his finance officer and his commanding officer, who, in turn, took it up with the commanding general. The

decision (verbal) of the commanding general was that the plaintiff would have to take back his original quarters or let the matter drop. This the plaintiff declined to do. There were no other quarters available for his occupancy on the Post.

8. December 6, 1939, plaintiff filed claims in writing with the commanding general, Fourth Corps Area, Atlanta, Georgia, for rental allowance for the period June 1 to July 22, 1935; also from September 1, 1935, to July 22, 1937, the period at issue in this case. These claims were disallowed. He then filed with the General Accounting Office a claim for rental allowance during these same periods. This claim was likewise disallowed.

9. If plaintiff is entitled to the rental allowance of a bachelor officer of his rank and length of service for the period from September 1, 1935, to July 22, 1937, there is due him the sum of $909.33, as computed by the General Accounting Office.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The evidence in this case shows, and we have found as a fact, that the quarters furnished plaintiff—that is, the quarters which he was verbally told by his commanding officer were the only quarters available for his occupancy—were manifestly inadequate under the terms of the pertinent statutes and regulations which required that quarters of the number of rooms for an officer of plaintiff's rank adequate for his occupancy be furnished, or that, in lieu thereof, a money allowance for rental of quarters be paid. No formal assignment of quarters to plaintiff was made during or prior to this claim, in the manner prescribed by the regulations made under the pertinent statutes. Plaintiff was simply told orally by his commanding officer that under the interpretations of the regulations issued by the Secretary of War June 24, 1935, (finding 7) he could occupy the quarters which the commanding officer had previously assigned to him verbally, which assignment had subsequently been terminated by the commanding officer, or let the matter drop.

When plaintiff reported for duty at Ft. Bragg, North Carolina, May 23, 1935, he was not given any written assignment of quarters. Instead, he was given verbal instructions by the commanding officer of the supply corps at the post to occupy quarters in the building formerly used as bachelor quarters for officers of the Regular Army but which had been turned over to the Civilian Conservation Corps, to which plaintiff had been assigned for active duty.

The quarters which plaintiff was verbally instructed to occupy consisted of one room approximately 13 x 14 feet, with adjoining bath, in a steam-heated, two-story building. Plaintiff as a first lieutenant was entitled for his exclusive use to two rooms, and, as a captain, was entitled to three rooms. He was never assigned either. The quarters in the building mentioned were divided into suites of two rooms, with a bath for each two suites. They were unfurnished, except for Army cots. Plaintiff occupied under protest one room in the two-room suite so assigned from May 23 to July 31, 1935, during which time the two-room suite was also occupied by from one to as many as six officers. There was an average of three or four officers, including plaintiff, occupying the two-room suite in which plaintiff had one room during the period June 1 to August 1, 1935, inclusive. During the period of occupancy by plaintiff of this room from May 23 to June 1, 1935, plaintiff was paid the statutory rental allowance. The quarters so occupied were noisy and overcrowded. Plaintiff had to work long hours and was unable to obtain sufficient rest. He protested several times to his commanding officer about the inadequacy of the quarters furnished him. Finally, on August 1, 1935, plaintiff was orally advised by his commanding officer that the commanding general had given permission for plaintiff to vacate the quarters and move into a nearby town, obtain quarters, and continue to receive rental allowance. Plaintiff vacated the quarters on the night of August 1 and was paid rental allowance during the month of August 1935. He has been paid no rental allowance since that time. When plaintiff was advised that rental allowance would not be paid to him after August 1935, he protested the discontinuance of the rental allowance to his commanding

general and was orally advised by the commanding general that payment of rental allowance had been discontinued in view of Changes #4, War Department Regulations, Relief of Unemployment, Civilian Conservation Corps, dated June 24, 1935, and that he would have to take back and occupy the inadequate quarters which he was originally, orally instructed to occupy, and which occupancy was later similarly terminated, or let the matter drop. Plaintiff declined to take back and occupy the inadequate quarters so referred to. There were no other quarters available for plaintiff's occupancy at the post. The refusal to pay plaintiff the statutory rental allowance in lieu of quarters was thereafter continued.

In these circumstances we think it is clear that plaintiff is entitled to recover. See *Donald K. Mumma* v. *United States*, 99 C. Cls. 261, decided February 1, 1943.

Counsel for defendant, in contending that plaintiff is not entitled to recover the statutory rental allowance herein claimed, relies upon the provision in section 6 of the act of June 10, 1922, as amended by the act of May 31, 1924, that "No rental allowance shall accrue to an officer, having no dependents, while he is on field or sea duty, nor while an officer with or without dependents is assigned as quarters at his permanent station the number of rooms provided by law for an officer of his rank or a less number of rooms in any particular case wherein, in the judgment of competent superior authority * * *, a less number of rooms would be adequate for the occupancy of the officer and his dependents," and also upon War Department Regulations, Changes No. 4, hereinabove mentioned, which provided as follows:

> *Availability of public quarters for Army personnel at work camps.*—a. Under the authority vested in him by the act of March 4, 1915 (38 Stat. 1069), and in view of the improved conditions of quarters now prevailing at Civilian Conservation Corps work camps, the Secretary of War has determined that shelter furnished for personal use at such camps to commissioned and warrant officers who have no dependents constitutes adequate quarters as contemplated by law.

b. Hereafter, commanding officers of Civilian Conservation Corps work camps, who, under the provisions of AR 210–70, are charged with the assignment and termination of assignment of quarters, will be guided in their determination as to availability of public quarters by the foregoing decision of the Secretary of War.

The act of March 4, 1915, referred to in the above-quoted regulations, provided that "The Secretary of War may determine where and when there are no public quarters available within the meaning of this or any other act."

We do not think that the provision of section 6 of the act of May 31, 1924, and the regulations of June 24, 1935, above referred to, and relied upon by defendant, have any bearing upon the decision of the question presented in this case. The statute of May 31, 1924, contemplated that the officer would be assigned for his personal use the number of rooms provided by law and that such quarters should be adequate for his exclusive occupancy. The statute provided that regulations in the execution of the provisions of the section with reference to payment of rental allowances and assignment of quarters should be made by the President. The regulations made under the statute provided that adequate quarters be assigned. That was not done in this case. As a matter of fact, the only real determination ever made was that the one room in the two-room suite was inadequate. Moreover, no quarters were ever assigned to plaintiff in the manner prescribed by the existing Army Regulations.

With reference to the above-quoted regulation of June 24, 1935, concerning the matter of adequacy of the buildings at Civilian Conservation Corps work camps as quarters for personal use of officers, and the direction that commanding officers who under the provisions of Army Regulations 210–70 were charged with the assignment and termination of assignment of quarters should be guided in their determination as to availability of public quarters by the above-mentioned decision of the Secretary of War that such Civilian Conservation Corps buildings were sufficient to constitute adequate quarters, it is clear from the language of this regulation that the Secretary of War did not decide, or intend to decide, that a less number of rooms than as provided by law for a commissioned officer would be ade-

quate quarters in the absence of the exercise of judgment of competent superior authority of the services concerned that a less number of rooms than as provided by law would be adequate in the particular case for the occupancy of the particular officer. He was not dealing with this question in the regulations of June 24, 1935. He was making a determination only that the Civilian Conservation Corps buildings in their improved condition were sufficient to constitute public quarters and for assignment of adequate quarters therein. This regulation of June 24, 1935, meant, we think, that the officer concerned should be assigned as quarters in the Civilian Conservation Corps buildings, which previously had been treated and regarded under the regulations only as "shelter" and not as statutory quarters, the number of rooms otherwise provided by law, and that quarters, when so assigned in such Civilian Conservation Corps temporary buildings, should be regarded as adequate quarters. The Secretary of War in this regulation stated that he was making the determination that public quarters were available at the Civilian Conservation Corps camps on his view of the improved condition of the buildings for quarters then prevailing at such camps. This indicates very clearly, we think, that in this regulation the Secretary of War was determining merely that quarters as required by law assigned to officers in the buildings then existing at Civilian Conservation Corps work camps would be adequate quarters within the meaning of the statute and the existing regulations; in other words, that the buildings were sufficient to constitute available government quarters. The word "shelter," as used in this regulation, had reference, as above stated, to the previous determination by the Secretary of War March 6, 1934, that quarters furnished to commissioned officers in temporary buildings, or shacks, at Civilian Conservation Corps work camps constituted only "shelter" and not adequate quarters and, therefore, in such cases, the rental allowance provided by law would be payable to such officers so occupying such quarters. This determination of the Secretary of War that shacks located at the Civilian Conservation Corps camps were not adequate government quarters and that space or quarters assigned to officers therein was only

shelter and did not constitute adequate quarters as contemplated by law, is set forth in Army Regulations 30½, issued March 6, 1934, as follows:

> 30½. *Availability of public quarters for Army personnel at work camps.*—a. Under the authority in him vested by the Act of March 4, 1915 (38 Stat. 997), the Secretary of War has determined that shelter furnished for personal use to commissioned and warrant officers at Civilian Conservation Corps work camps and consisting of tents or space in temporary buildings or shacks does not constitute adequate quarters as contemplated by law, and if such shelter only has been or is available and has been or is being furnished at any work camp, then there are not, and at no time have been, any public quarters available for such commissioned and warrant officers at said work camp.
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> b. Hereafter, commanding officers of Civilian Conservation Corps work camps, who, under the provisions of AR 210–70, are charged with the assignment and termination of assignment of quarters, will be guided in their determination as to availability of public quarters by the foregoing decision of the Secretary of War. Vouchers covering rental allowances for officers on duty at Civilian Conservation Corps work camps will hereafter be supported by certificates from commanding officers concerned. These certificates will clearly set forth whether or not adequate public quarters were available for assignment during the period covered.

In view of the foregoing, we cannot agree with the contention of the defendant, based upon the regulations contained in Changes No. 4 of June 24, 1935, that "It seems clear, then, that in accordance with the requirements of the statute, competent, superior military authority, viz, the Secretary of War, has determined that plaintiff's quarters were adequate." In the regulations of June 24, 1935, as hereinbefore stated, the Secretary of War did not pass upon and did not intend to determine that quarters in the Civilian Conservation Corps buildings which did not meet the requirements of the statutes and existing regulations as to adequacy would be adequate within the meaning of paragraph 4 of section 6 of the act of May 31, 1924. The Secretary of War, by paragraph (b) of the regulations of June 24, 1935, expressly left the matter of assignment of quarters, the determination

of what constituted adequate quarters, and the matter of determining whether a less number of rooms than as required by law and the regulations constituted adequate quarters, to the commanding officer concerned.

It is clear in this case that the commanding officer at the Civilian Conservation Corps post at Ft. Bragg did not determine that a less number of rooms than as provided by law and the regulations constituted adequate quarters. When he orally advised plaintiff shortly prior to September 1, 1935, that he would have to occupy the same quarters which he, the commanding officer, had already determined to be inadequate, or let the matter drop, the commanding general simply misinterpreted the regulations of June 24, 1935, and based his advice to plaintiff that he would have to occupy the inadequate quarters (which had previously been orally assigned and orally revoked), on the action of the finance officer of the War Department in advising plaintiff that he would not be paid rental allowance after the month of August 1935. This ruling of the finance officer was simply that C. C. C. buildings constituted available government quarters and nothing more.

Defendant makes the further contention that plaintiff should be denied recovery of rental allowance after September 1, 1935, on the ground that he did not file a claim with the Corps area commanding general until December 6, 1939, under Army Regulations 210–70 bj (2), August 20, 1934, which dealt with the assignment of quarters and also provided that "Any officer may appeal to the Corps Area Commander * * * if he feels that the commanding officer has not properly determined his case. * * *" This regulation does not make it mandatory that the officer concerned appeal to the Corps Area Commander as a condition to his right to claim rent allowance provided by statute. In any event, the plaintiff was never assigned quarters, either adequate or inadequate, in accordance with the requirements of the regulations, nor did his claim for rental allowance arise as a result of the assignment to him in accordance with the regulations of quarters which he considered to be inadequate. The statute is mandatory in its provision that, except as provided in the fourth paragraph

of section 6, the officer concerned "shall be entitled at all times to a money allowance for the rental of quarters." The defense of laches is not well founded. The petition was filed well within the limitation provided by law for the bringing of suits on claims of the character here involved.

Judgment will be entered in favor of plaintiff for $909.33. It is so ordered.

MADDEN, *Judge*; WHITAKER, *Judge*; and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

CADMUS J. BAKER v. THE UNITED STATES

[No. 45331. Decided October 4, 1943]

On the Proofs

Pay and allowances; increased pay for nonflying medical officer in Air Corps, United States Army; definition of "nonflying officer."—Where plaintiff, a lieutenant colonel in the Medical Corps, United States Army, has not shown that he ever received an aeronautical rating as a pilot of service types of aircraft, it is *held* that plaintiff's increase in pay for flying was limited to $1,440 per year under the 1934 Appropriation Act which provided that appropriations thereunder should not be "available for increased pay for making aerial flights by nonflying officers above the grade of captain at a rate in excess of $1,440 per annum," and plaintiff is not entitled to recover more for the period from January 1 to June 30, 1935.

Same.—The expression "nonflying officer" as used in the Appropriation Act of April 26, 1934 (48 Stat. 614, 618), in the absence of any indication that Congress had in mind any other meaning, may be interpreted in accordance with the definition of a "flying officer" given in Section 2 of the Act of July 2, 1926 (44 Stat. 780, 781), which provided that "wherever used in this Act a flying officer in time of peace is defined as one who has received an aeronautical rating as a pilot of service types of aircraft."

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *King & King* were on the brief.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff, on March 6, 1917, accepted appointment as a first lieutenant, Medical Section Officers' Reserve Corps, United States Army, and on March 8, 1917, entered on active duty; on June 23, 1917, he accepted a commission as a first lieutenant, Medical Corps, United States Army, to rank from June 18, 1917; he was promoted to captain on August 3, 1918, and to major on November 5, 1918, to rank from August 3, 1918; on April 6, 1937, he was promoted to his present rank of lieutenant colonel. He has served continuously on active duty since March 8, 1917, and during the period from August 1, 1934, to June 30, 1935, he was a qualified flight surgeon.

2. Personnel Orders No. 175, issued July 27, 1934, by the Chief of the Air Corps, War Department, Washington, D. C., provided in part as follows:

> 4. Effective August 1, 1934, the following Medical Corps officers, qualified Flight Surgeons, are detailed to duty requiring regular and frequent participation in aerial flights, pursuant to Army Regulations 35–1480, during such period as they may be assigned to duty with any aeronautic headquarters or unit or assigned to duty at a station where there is an aeronautic unit:
>
> Major Cadmus J. Baker, Medical Corps
>
> *　　*　　*　　*　　*
>
> This detail to duty involving flying requires aerial flights for the purpose of study and observation of the physical and psychological condition of flying personnel.

3. Personnel Orders No. 149, issued June 25, 1935, by the Chief of the Air Corps, War Department, Washington, D. C., provided, in part, as follows:

> 1. Under authority contained in Army Regulations 35–1480, the following Medical Corps officers (Flight Surgeons) are relieved from further duty requiring them to participate regularly and frequently in aerial flights, effective June 30, 1935:
>
> *　　*　　*　　*　　*
>
> Major Cadmus J. Baker, Medical Corps
>
> *　　*　　*　　*　　*

4. From August 1, 1934, to June 30, 1935, plaintiff was on duty as flight surgeon at Wheeler Field, Teritory of Hawaii,

a station where Air Corps United States Army Troops were on duty. This assignment of duty required plaintiff to participate regularly and frequently in aerial flights, and between the dates stated above plaintiff performed the number of aerial flights prescribed by Executive Order No. 5865, dated June 27, 1932.

5. The petition in this case was filed January 21, 1941. If plaintiff were entitled to receive an increase of 50 percent of his base and longevity pay, as provided by the Act of July 2, 1926, U. S. C., Title 10, Section 300, while assigned to and performing duty requiring him to participate regularly and frequently in aerial flights, there would be due him from January 1 to June 30, 1935, the sum of $212.07 as computed by the General Accounting Office.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiff, during the period from January 1, 1935, to June 30, 1935, held the rank of Lieutenant Colonel, Medical Corps, United States Army. He was a qualified Flight Surgeon, and had been, by proper order, detailed to duty requiring regular and frequent participation in aerial flights and he made the flights. He claims that, under the applicable statutes, he should have been paid 50% more than the regular pay of his rank. He was, in fact, paid $1,440 per annum more than the regular pay of his rank. He sues for the difference.

Section 13 (a) of the Act of June 4, 1920, 41 Stat. 759, 768, contains the following provision:

> * * * Officers and enlisted men of the Army shall receive an increase of 50 per centum of their pay while on duty requiring them to participate regularly and frequently in aerial flights; and hereafter no person shall receive additional pay for aviation duty except as prescribed in this section; * * *

The Army Appropriation Act of April 26, 1934, 48 Stat. 614, 618, making appropriations for the fiscal year ending June 30, 1935, contains the following language:

> * * * none of which shall be available for increased pay for making aerial flights by nonflying officers above the grade of captain at a rate in excess of $1,440 per annum, which shall be the legal maximum rate as to such nonflying officers above the grade of captain; * * *

Since plaintiff's grade was above that of captain, the question is whether plaintiff was a "nonflying officer" within the meaning of the latter statute. If he was, $1,440 was the maximum increase over his regular pay that the statute permitted.

To ascertain what Congress meant by the expression "nonflying officer," our only direct aid seems to be the definition of a "flying officer" given in Section 2 of the Act of July 2, 1926 (44 Stat. 780, 781). It is as follows:

> Wherever used in this Act a flying officer in time of peace is defined as one who has received an aeronautical rating as a pilot of service types of aircraft.

While this definition is, in terms, limited to use in interpretation of the Act of 1926, the meaning which it gives to the expression is a natural one, and, in the absence of any indication that Congress had any other meaning in mind when it used the correlative expression "nonflying officer" in the Act of April 26, 1934, we conclude that it used that expression with a corresponding meaning.

Plaintiff has not shown that he ever received an aeronautical rating as a pilot of service types of aircraft. His increase in pay for flying was therefore limited by the 1934 Act to $1,440 per year. He was paid that increase, and is not entitled to recover more. See *Idzorek* v. *United States*, 94 C. Cls. 659; *Schofield* v. *United States*, 97 C. Cls. 263.

It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

SOUTHEASTERN FAIR ASSOCIATION v. THE UNITED STATES

[No. 45399. Decided October 4, 1943]

On the Proofs

Social Security taxes; corporation conducting educational fair, without profit to individuals, exempt.—Where plaintiff, a corporation, was organized for the purpose of conducting an annual fair, whose activities and exhibits are unquestionably educational, except for incidental concessions utilized to attract attendance; and where the income from such fair is used to pay expenses and maintain, repair and improve the buildings and grounds, and no dividends are paid; it is *held* that plaintiff is exempt from Social Security taxes under the provisions of Sections 811 and 907 of the Social Security Act (U. S. Code, Title 42, Sections 1011 and 1107).

Same.—Whether an enterprise is exclusively educational, or religious, or charitable, for tax exemption purposes, depends not upon how it earns its income but how it spends its income. *Trinidad* v. *Sagrada Orden*, 263 U. S. 578; *Sand Springs Home* v. *Commissioner*, 6 B. T. A. 198.

Same; same language in different statutes.—Where Congress in different statutes uses substantially the same language, it can not be said that Congress intended that the language so used should have a different meaning in each of the acts.

The Reporter's statement of the case:

Mr. J. C. Murphy for the plaintiff.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the briefs.

The court made special findings of fact as follows:

1. Plaintiff is a corporation organized under the laws of Georgia, with its principal office in Atlanta. The particular business which it was authorized to carry on was

> * * * to hold and conduct from time to time, and at such times as may be determined, in or near the City of Atlanta, in the State of Georgia, in the southeastern section of the United States, fairs, exhibitions, and expositions of the products and resources of the States in the

southeastern section of the United States, and of any or all of the other States of the United States, and of any or all other countries, and of the appliances, machinery, inventions, property, and devices used in the cultivation, preparation, manufacture, and use of such products and resources, together with exhibitions of horses, cattle, sheep, swine, poultry, pet stock, livestock, dairy products, agriculture, horticulture, floriculture, manufacture, liberal arts, women's work, educational exhibits, and fine arts, and to conduct any and all exhibitions or institutions proper or appropriate to the holding of a fair or exposition.

2. Beginning on October 6, 1937, plaintiff sought a ruling from the Commissioner of Internal Revenue regarding its liability for the payment of social security taxes under Titles VIII and IX of the Social Security Act. January 7, 1938, the Commissioner wrote plaintiff that it was deemed advisable to determine its status for Federal income tax purposes before ruling on its status for social security tax purposes. He held that plaintiff was entitled to exemption from payment of income taxes under the provisions of Section 101 (8) of the Revenue Act of 1936 and the corresponding provisions of prior revenue acts (49 Stat. 1648, 1674).

3. September 24, 1938, the Commissioner advised plaintiff that it was not entitled to exemption from social security taxes. His letter reads in part as follows:

> Sections 811 (b) (8) and 907 (c) (7) of the Social Security Act provide that the taxes imposed by Titles VIII and IX of the Act are not applicable with respect to services performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual. Section 101 (6) of the Revenue Act of 1936 contains provisions similar to those of Sections 811 (b) (8) and 907 (c) (7) of the Social Security Act. Since the Southeastern Fair Association is held exempt under Section 101 (8) of the Revenue Act of 1936, it is evident that it is not organized and operated exclusively for one or more of the purposes specified in Sections 811 (b) (8) and 907 (c) (7) of the Social Security Act.

4. Plaintiff refused to execute and file any returns under Titles VIII and IX of the Social Security Act, and appropriate returns were executed in its behalf by a deputy collector of internal revenue pursuant to Section 3612 of the Internal Revenue Code. Thereafter the following taxes, interest and penalties were duly assessed by the Commissioner and paid by plaintiff on the dates shown:

TITLE VIII—SOCIAL SECURITY ACT

Period	*Tax*	*Penalty*	*Interest*	*Total*	*Paid*
Jan.–June, 1937	$173. 62	$43. 42	$29. 81	$246. 85	2/28/40
July–Dec., 1937	406. 96	101. 75	54. 22	562. 93	"
3 months ending 3/31/38	141.06	35. 27	15. 02	191. 35	"
3 months ending 6/30/38	40. 30	10. 08	3. 68	54. 06	"
3 months ending 9/30/38	93. 38	23. 35	7. 13	123. 86	"
3 months ending 12/31/38	307. 34	76. 84	18. 84	403. 02	"
3 months ending 3/31/39	139. 80	34. 95	6. 50	181. 25	"
3 months ending 6/30/39	51. 92	12. 98	1. 63	66. 53	"
3 months ending 9/30/39	110. 28	27. 57	1. 80	139. 65	"
3 months ending 12/31/39	288. 12	72. 03	1. 09	361. 24	3/14/40

TITLE IX—SOCIAL SECURITY ACT

1936	$321. 41	$80. 35	$56. 56	$458. 32	3/23/40
1937	770. 05	192. 51	96. 89	1, 059. 45	"
1938	1, 000. 81	265. 20	69. 82	1, 395. 83	"
1939	1, 301. 14	325. 29	10. 57	1, 637. 00	4/6/40

5. August 9, 1940, plaintiff filed three claims for refund of the taxes collected under Title VIII of the Social Security Act as follows:



Period	*Amount*
1–1–37 to 12–31–37	$809. 78
1–1–38 to 12–31–38	772. 29
1–1–39 to 12–31–39	748. 67

The ground relied upon in these claims was as follows:

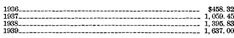
> * * * the Southeastern Fair Association, claimant, is exempt under Title VIII, Section 81, 49 Statute, 639 (August 14, 1935, c. 531), as amended August 10, 1939, c. 666 (Title IX, Section 905 (a), 53 Statute, 1400) and being Subsection 8 of Subsection b of Title 42 of U. S. C. A., Section 1011, and the Southeastern Fair Associa-

tion was organized and operates exclusively for scientific and/or educational purposes, and no part of the net earnings inured to the benefit of any private shareholders or individuals.

The Commissioner rejected these claims by letter dated October 24, 1940, reading in part as follows:

> The records of the Bureau indicate that in a letter addressed to the Association under date of September 24, 1938, it was held that the Association and its employees, including its officers, are liable with respect to the taxes imposed by Title VIII of the Social Security Act. Such ruling was affirmed by the Bureau under date of November 16, 1938. The above ruling is also applicable under Subchapter A of Chapter 9 of the Internal Revenue Code, in force prior to January 1, 1940.

6. August 9, 1940, plaintiff filed four claims for refund of taxes paid under Title IX of the Social Security Act, as follows:



1936	$458.32
1937	1,059.45
1938	1,395.83
1939	1,637.00

These claims were based on the following ground:

> * * * the Southeastern Fair Association, claimant, is exempt under Title IX, Section 907, 49 Statute, 642 (August 14, 1935, c. 531), as amended June 25, 1938, c. 680, Section 13 (a), 52 Statute, 1110, being Subsection 7 of Subsection c of Title 42, U. S. C. A., Section 1107, and the Southeastern Fair Association was organized and operates exclusively for scientific and/or educational purposes, and no part of the net earnings inured to the benefit of any private shareholders or individuals.

The Commissioner rejected these claims by letter dated October 22, 1940, from which the following is quoted:

> The records of the Bureau show that you are exempt from the payment of income tax under the provisions of Section 101 (8) of the Revenue Act of 1936 and corresponding provisions of prior revenue acts.
> Since there are no provisions under Title IX of the Social Security Act and the Federal Unemployment Tax Act in force prior to January 1, 1940, corresponding with Section 101 (8) of the Revenue Act of 1936, under which you were held entitled to exemption for Federal

income tax purposes, you are not exempt from the payment of excise tax under the provisions of Title IX of the Social Security Act and Subchapter C, Chapter 9, of the Internal Revenue Code, as amended.

7. The fair authorized by plaintiff's corporate charter is usually held in the fall of the year for a period not exceeding 10 days. The fair grounds are owned by the City of Atlanta. Plaintiff has possession of the property under a lease from the City dated September 23, 1924, the material terms of which are as follows:

(*a*) Plaintiff agreed that during the term of the lease, which is 25 years, it would hold a fair on the leased property in the fall of each year for a period of not less than six consecutive days; (*b*) that the fair would be maintained at a high standard of excellence; (*c*) that plaintiff would reinvest all of the profits made by it in improvements on the grounds; (*d*) that during the continuance of the lease all of the common stock, which was the controlling stock of the corporation, would be owned and controlled exclusively by the Chamber of Commerce, a civic organization; (*e*) that during the term of the lease plaintiff would not pay any dividend or interest of any kind on the common or preferred stock but might retire a part of the preferred stock under certain conditions.

8. Plaintiff maintains the leased property as a recreation park and playground for the free use of the public, except during the period each year when the fair is held and on occasions when fraternal or civic organizations are given the exclusive use of the property for entertainment purposes.

9. Plaintiff issued and has outstanding 10 shares of common stock of the par value of $100, and preferred stock in the amount of $69,000. The common stock, which is the voting stock, is held exclusively by the Atlanta Chamber of Commerce. The preferred stock has been subscribed by individuals and business firms in Atlanta. No dividends have ever been declared or paid on either common or preferred stock, except one liquidating dividend, which was used to retire a portion of the preferred stock.

10. Annually before the fair is held, plaintiff's officers and directors confer with educators, representatives of the Georgia Agricultural Extension Service, State Planning

officials, and others for the purpose of planning exhibits and demonstrations that will be educational to visitors at the fair and to the exhibitors. These exhibits, typical of those displayed during the years 1936, 1937, 1938, and 1939 pursuant to that purpose, include the following:

A. *Livestock.*—A National Livestock Show is held each year with entries of beef cattle, dairy cattle, swine, sheep, mares, colts, and mules, representing the best individual animals from the various breeds and types of livestock in the southeastern States and in some of the midwestern States. Animals from the 4-H Club projects, including dairy calves, beef calves, and pigs, are also shown. The National Poultry Show, with competing entries by poultry owners from 30 or 40 States, is likewise held at the fair. In connection with the livestock and poultry shows, there are lectures and demonstrations on the best methods of feeding livestock, cutting and marketing meat, marketing poultry and eggs, and handling milk.

B. *Agricultural Exhibits.*—These exhibits are under the supervision of the County Agricultural Agent, a representative of the U. S. Department of Agriculture and of the State Extension Service. Included are displays and demonstrations of agricultural products, practices, and resources by 4-H Club members, by individuals and by various counties in the southeastern States. The 4-H Club boys demonstrate the best methods of producing and marketing agricultural products, and conserving natural resources. The 4-H Club girls exhibit the results of approved practices in home economics, including home dressmaking, the curing of raw materials, and the canning of food.

C. *Machinery.*—This includes all types of the latest models of farm and road machinery and equipment for controlling soil erosion.

D. *Other Exhibits.*—These relate to home equipment, rural housing, heating units, and waterworks systems designed for homes not connected with a public water supply. There are also exhibits by organizations like the Red Cross and Y. M. C. A., and by State and City agencies, including the State Forest Service, State Highway Patrol, and City Health Department.

11. The exhibits at the fair are a part of the educational program conducted by the Agricultural Extension Service for the benefit of 4-H Club members. Rural youths who

join the clubs are instructed by the County Agricultural Agent and the County Home Demonstration Agent in carrying out agricultural and home economics projects, such as the growing of cotton, peanuts, and corn by boys, and the making of clothing and canning of food by girls. Through elimination contests the best of these projects are selected for exposition at the fair, for the purpose of demonstrating the results of 4-H Club work, arousing the interest of non-member youths whom the County agents cannot reach individually, and training the club members who prepare and present the exhibits.

Prior to the fair, livestock judging teams composed of members of 4-H Clubs and of the Future Farmers of America compete throughout the State. The four winning teams are sent to the fair to give the contestants an opportunity to judge the best animals in the area and to observe the work of professional judges from the colleges.

12. The school officials of the City of Atlanta and Fulton County consider the fair to be educational. They cooperate with plaintiff by giving the school children a holiday to attend the fair. Under the leadership of teachers of vocational agricultural and home economics, the students prepare and present exhibits of soil conservation, reforestation, livestock raising, diversified farming, cooking, garment making, first aid, health work, and the care of children. A Statewide spelling bee is held at the fair each year under the direction of the State Superintendent of Schools.

13. In order to obtain the best exhibits and to stimulate interest in the fair, plaintiff offers prizes and premiums for the winning displays. These awards provide an incentive for study and improvement in the quality of the exhibits from year to year.

14. Trained lecturers are stationed at nearly all exhibits to explain or demonstrate the subjects exhibited. They distribute printed material and photographs, and in some cases present moving pictures.

15. The fair, which is open from 9 a. m. to midnight, is operated on a tract of land called Lakewood Park. There is a general admission charge of 50 cents, but no charge is made for any of the exhibits. In order to attract visitors

to the fair, there is a grandstand on the property at which free shows, including vaudeville acts, fireworks, lectures, and, in some years, automobile races, are held daily. Speakers of national prominence are obtained to formally open the fair, and their speeches are broadcast over the radio.

Plaintiff does not operate an amusement section, but in order to obtain funds for payment of prizes and other expenses, it leases a part of the grounds to a carnival company and other concessionaires. This section, known as the Midway, also includes a roller coaster, Ferris wheel, merry-go-round, and other forms of amusement.

Plaintiff leases space in one of its buildings for commercial exhibits at prices ranging from $50 to $125, in accordance with the amount of space occupied. During a typical year about 50 business concerns lease space for exhibits in order to show and sell their merchandise and equipment.

16. The income of plaintiff is derived from gate admission fees, concession privileges, investment of corporate funds, public and private donations, and ground rents received from persons who have been permitted to build temporary homes on the fair grounds. All income remaining after the cost of prizes and other operating expenses has been paid is spent on repairs and permanent improvements to the grounds and buildings in accordance with the terms of plaintiff's lease.

During the years involved in this case no part of the net earnings of plaintiff inured to the benefit of any private shareholder or individual.

17. The President of the Southeastern Fair Association receives compensation of $125 per month, and the other officers and directors, except the Secretary and Treasurer, receive $50 per month. This compensation is paid after each annual fair is held and is in the form of a bonus, depending upon the success of the fair. The fair has always operated at a profit.

18. The competitive judging and the exhibits, with the accompanying demonstrations, lectures, and distribution of printed material, impart information, and those who attend the fair, including the exhibitors, acquire knowledge therefrom. The free entertainment at the grandstand and the

amusements in the Midway are furnished incident to, and in furtherance of, the purpose for which the fair is operated.

19. Plaintiff was organized and is operated solely for the purpose of assisting and encouraging the improvement, betterment, growth, and advancement of the southeastern section of the United States, and the agricultural, livestock, mining, manufacturing, industrial, business, art, and educational interests and enterprises of that section.

20. Plaintiff, during the period here in question, was a corporation organized and operated exclusively for educational purposes, within the meaning of Sections 811 and 907 of the Social Security Act.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiff, Southeastern Fair Association, sues to recover taxes assessed against it and paid by it under Titles VIII and IX of the Social Security Act, which statute imposes excise taxes upon employers for the purpose of providing funds to meet social security payments. Plaintiff contends that the provisions of Sections 811 and 907 of the Social Security Act (U. S. C. 1940 ed., Title 42, Sections 1011 and 1107) exempt it from these taxes, by making the taxes inapplicable to "* * * a corporation, * * * organized and operated exclusively for * * * educational purposes, * * * no part of the net earnings of which inures to the benefit of any private shareholder or individual."

We have found, and the Government concedes, that no part of plaintiff's net earnings inures to the benefit of any private shareholder or individual. It contends, however, that plaintiff does not fulfill the requirement, for exemption, that it be organized and operated exclusively for educational purposes.

Plaintiff was organized for the purpose of conducting an annual fair in or near Atlanta, Georgia. The objects of the fair are stated in plaintiff's charter, quoted in finding 1. Plaintiff leases the fair grounds from the city of Atlanta, the material terms of the lease being shown in finding 7. Plaintiff obtained its initial capital by selling preferred stock in the amount of $69,000 to individuals and business firms in

Atlanta. Its 10 shares of voting stock are held by the Chamber of Commerce of Atlanta. Its lease agreement with the city forbids it to pay dividends on its stock. It makes a profit on the annual fair from admission charges and fees paid by amusement concessionaires and commercial exhibitors. The profit is used to pay salaries and wages to employees and to maintain, repair and improve the buildings and grounds.

The exhibits and serious activities of the fair are described in findings 10–14. They are unquestionably educational, planned and managed by persons whose business it is to inform people about the resources of the region and the country, and methods by which they may be conserved, utilized, and improved. But, the Government says, the amusements described in finding 15, furnished by plaintiff at the grandstand, and by a carnival company and other entertainers who buy concessions, are not educational, hence plaintiff does not, within the meaning of the statute, operate "exclusively for * * * educational purposes."

Plaintiff's purpose in furnishing free noneducational amusement at the grandstand is to get people to come to the fair, pay the 50-cent admission charge, and see the educational exhibits. Its purpose in renting concessions to commercial entertainers, and space to commercial exhibitors, is to get money to operate the fair, as well as, again, to attract attendance.

Whether an enterprise is exclusively educational, or religious, or charitable, for tax exemption purposes, depends, not upon how it makes its money, but upon the purpose for which it makes it, that is, how it spends what it makes. *Trinidad* v. *Sagrada Orden*, 263 U. S. 578; *Sand Springs Home* v. *Commissioner*, 6 B. T. A. 198. This is necessarily so, unless the exemption is to be denied to all entities not adequately endowed with funds which other persons have made by engaging in some enterprise for profit. We think that the evidence shows no other purpose, directly connected with the conduct of the fair, than an educational one. It may well be that those who contributed capital to plaintiff may have expected to make money out of the patronage of those who came to Atlanta to attend the fair, or to share

in the greater prosperity which might come to the region if its agriculture should be made more productive as a result of the education which those who attended the fair might gain. These are motives which sometimes actuate donors to colleges and universities, but these institutions do not lose their tax exemption thereby.

The Government urges that exemptions from social security taxes should be more narrowly restricted than exemptions from income taxes, because, if the exemption is allowed, employees of the exempted employer do not receive the benefits of the Social Security Act when they become unemployed or reach old age. We have doubts of the propriety of attributing to Congress an intention that substantially the same language, used in two different statutes, should have a substantially different meaning in each of the acts. But we think the present case is plainly enough within the scope of the exemption in the Social Security Act to make it unnecessary to decide what would be the right approach to a case which lay on the border line.

Plaintiff may recover its payments, with interest as provided by law. Entry of judgment may await the filing of a stipulation by the parties as to the amount.

It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

In the above case, upon a stipulation filed by the parties and in accordance with the above opinion, judgment was entered on November 1, 1943, for the plaintiff in the sum of $6,881.34, with interest as provided by law on the several amounts as follows: On $1,969.50 from February 28, 1940; on $361.24 from March 14, 1940; on $2,913.60 from March 23, 1940; and on $1,637 from April 6, 1940.

B-W CONSTRUCTION COMPANY (A CORPORATION) v. THE UNITED STATES

[No. 45421. Decided October 4, 1943]

On the Proofs

Government contract; statute of limitation begins to run when contract is completed and final voucher submitted.—Where Government building, constructed under contract by the plaintiff, was occupied by the Government on September 21, 1933, and on that date the work was complete except for certain defects, which were corrected to the satisfaction of the Government in the fall of 1935; and where final voucher was submitted on July 20, 1936, and paid shortly thereafter; suit filed on April 5, 1941, was not barred by the statute of limitation. (U. S. Code, Title 28, Section 26.)

Same.—Under the decisions in *Pink* v. *United States*, 85 C. Cls. 121, and *Austin Engineering Co.* v. *United States*, 88 C. Cls. 559, the statute of limitation did not begin to run until the work was completed and final voucher was presented.

Same; admission of some delay not a finding that defendant was responsible therefor.—Where the contracting officer admitted there had been a slowing up of the work on Government building but stated he did not have knowledge as to the cause of the delay in completion, such statement was not a finding that defendant was responsible therefor.

Same; construction of statute by contracting officer not binding or conclusive.—Where in connection with the contract for the construction of a Government building, plaintiff, contractor, submitted a proposal as to cost of certain additions which the contracting officer acknowledged were extra work, which work was performed; and where the contracting officer rejected the claim for payment for such extra work solely on the ground that payment could not be made under Section 320 of the Economy Act of June 30, 1932 (47 Stat. 382, 412); and where it is not denied that plaintiff was entitled under the contract to the additional compensation claimed; it is *held* that the contracting officer's rejection of plaintiff's claim, on the grounds stated, was not an interpretation of the drawings or specifications but a construction of the statute, as to which neither the contracting officer nor the head of the department was the final arbiter.

Same.—Whether Section 320 of the Economy Act barred plaintiff from receiving additional compensation for admittedly extra work was neither a question of fact nor a dispute "arising under this contract"; and the decision of the contracting officer thereon is not binding on the contracting parties nor on the court.

The Reporter's statement of the case:

Mr. Frederic N. Towers for plaintiff. *Messrs. Frost, Myers & Towers* were on the brief.

Mr. William A. Stern, II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a corporation organized and existing under the laws of the State of Illinois, with its office and principal place of business in Chicago, Illinois.

2. March 15, 1932, defendant and plaintiff entered into a contract under which the plaintiff agreed to furnish all labor and materials, and perform all work required for demolition of the then buildings on the site and the construction of the Post Office and Court House at Davenport, Iowa, including approaches, for the consideration of $366,840, in strict accordance with the specifications, schedules, and drawings.

The contract is attached to the petition as an exhibit.

3. The contract provided that the work was to be completed within 500 calendar days after the date of receipt of notice to proceed. Plaintiff received notice to proceed April 6, 1932, which made the completion date under the contract August 19, 1933. By three extra work orders the completion date was extended 31 days, and for an additional 25 days on account of the slowing up of the work between the last of November and January alleged to have been caused by a delay in the delivery of spandrels. These time extensions fixed October 14, 1933 as the completion date. The work was practically completed September 20, 1933, except for the correction of certain defects. The defendant took over and occupied the building on September 21, 1933. The defects were all corrected very soon after the building was taken over, except for stains and other defects in the laurel panels of the courtroom. This part of the work was in charge of a subcontractor, and after considerable experimenting and trying out of different methods the defects in them were corrected to the satisfaction of the defendant by the fall of 1935.

Final payment under the contract was made on voucher signed by plaintiff on July 20, 1936. No amount was deducted for liquidated damages for delay.

Plaintiff's first claim

4. Under the contract, specifications, and drawings defendant was to furnish certain models for stonework, bronze metalwork, and woodwork. The defendant had a contract with a Chicago sculptor to cast these models from drawings furnished by defendant's architect. When the sculptor completed the models they were sent to plaintiff's subcontractors to carve the stone and the wood, and to cast the metal to be used in the construction of the building.

5. *Stone models.*—Plaintiff claims it was delayed waiting for carved portions of stone for use in the cornice and frieze courses from December 6, 1932 to December 16, 1932, and again from December 29, 1932 to January 26, 1933, a total of 39 days. During the first period mentioned it was so cold that no work was done on the building, and this was also true during a part of the second period.

There was some delay in the delivery to the job of the carved stone, but it is impossible to tell from the testimony whether this delay was caused by the tardy delivery of the models for the stone to plaintiff's subcontractor or whether the delay was due to the fault of plaintiff's subcontractor. Whatever delay there was in the delivery of the carved stone ran concurrently with the delay in the delivery of the spandrels discussed in the next finding.

6. *Bronze model.*—Plaintiff claims that it was delayed due to failure of the defendant to furnish model No. 5 for the bronze spandrels in time for them to be fabricated and delivered on the job when needed. These spandrels were made of ornamental bronze and were to be affixed between the windows on the second and third stories. By November 29, 1932, the building had reached the point at which the spandrels were needed. The spandrels were not delivered to plaintiff until January 18, 1933. The time between the two dates is 50 days. October 25, 1933, plaintiff wrote the supervising architect claiming that the cause of the delay was the lack of model No. 5, which was to be furnished to the plaintiff by the defendant, and requested a time extension of 50 days. January 10, 1934, the supervising architect wrote plaintiff as follows:

> Reference is made to your letter of October 25, 1933, naming a delay of fifty days due to the lack of model No. 5 for the bronze spandrels, in connection with your contract for construction of the Post Office at Davenport, Iowa.
>
> The contract for the models at this building was awarded on May 31, 1932, but it was not until September 25 that the modeller received the full-size drawing from the Architect. The model photographs were sent in to this office approved by the Architect on October 22, and on November 2 they were returned, approved by this office with instructions to ship the model. The model was shipped on November 5, and you state that the spandrels were received on January 18, 1933. We do not have knowledge as to how much the delay with regard to the spandrels affected the entire completion of the building but as there was a slowing up of the work between the last of November and January of about 5%, it is considered that the contract as a whole was delayed for twenty-five (25) days, due note of which will be made at time of final settlement.

No appeal was taken from the decision of the supervising architect.

There is no other evidence which tends to show the length of time the completion of the building was delayed by the tardy delivery of the spandrels, nor is there any proof to show whether or not the defendant was responsible for this delay.

7. *Wood models.*—Plaintiff claims it was delayed from June 3, 1933, the date when it was ready for the installation of the ornamental wood in the courtroom, until August 4, 1933, the date the ornamental wood was received on the job, and that the late delivery of the carved wood was caused by defendant's failure to furnish models on time.

The models for the woodwork were designated as models 15, 16, 17, 18, and 20. Model 15 was the model for the Judge's entrance, and model 20 was a model for the band on the Judge's desk. The building was ready for the installation of the ornamental wood in the courtroom on June 3, 1933, but the wood was not received until August 4, 1933, but it is impossible to tell from the proof how much of this delay was caused by the tardy delivery of the models by the defendant

and how much to the delay of plaintiff's subcontractor in furnishing the wood.

There were defects in the erection of this woodwork. The defects in it were corrected and the refinishing was completed September 12, 1935, and the courtroom work was accepted December 13, 1935.

Plaintiff's second claim

8. Paragraph 1373 of the specifications reads as follows:

> REMOVAL AND RESETTING OF ELECTROLIERS.—The contractor shall remove three cast iron street electroliers from the present sidewalk when the wrecking of the present building is started, and shall store same until completion of the new sidewalks, when he shall provide all materials and labor necessary for resetting. One of the three electroliers will be reset on a reinforced concrete slab. The contractor shall furnish and install all required wiring connections using steel-sheathed, lead-encased rubber insulated cables.

9. There were three electroliers for street-lighting purposes outside the old building, and these were stored by plaintiff during the period of construction. During the storage and for some cause which is not shown by the record the lead sheet cable used to connect the electroliers was damaged and the City of Davenport refused to permit plaintiff to re-install the electroliers and connect them with the damaged cable.

10. June 13, 1933, plaintiff wrote the supervising architect as follows:

> We herewith respectfully request that you give us an interpretation of Paragraph 1373 of the electrical specifications for the above-named project, with special attention to the amount and extent of new cables which our contract requires us to furnish and install.
>
> We shall appreciate an early reply.

11. June 28, 1933, defendant's construction engineer wrote plaintiff as follows:

> Please submit through this office, as an addition to your contract for the construction of the Davenport, Iowa, Post Office, a proposal for furnishing and install-

ing 785 lineal feet of armored electric conductor for sidewalk lighting, to conform with the following specification:

Cable to be single conductor No. 8 Parkway cable, 6,000 volts working pressure, insulated with 7.32 in. wall made of thirty percent wild, up-river Para rubber, spec. grav. not less than 1.75 as compared with distilled water at 60° F., over which shall be one layer of tape, 1/4 inch lap, to be covered with 3.32 lead, one layer of saturated jute to be covered with two layers .020 x 3/4″ Japan steel tape, to be covered with one layer of saturated jute over all.

12. July 3, 1933, defendant's construction engineer wrote plaintiff as follows:

> Your letter of June 13, 1933, requesting an interpretation of paragraph 1373 of the specification for the construction of the Davenport, Iowa, Post Office was referred to the Supervising Architect on June 17.
>
> Under date of June 30 the Office advises that new cable must be installed and no splicing will be permitted; the work must be satisfactory to the City authorities.
>
> My letter of June 28 to you indicated the amount and nature of new electric cable that the City will require. So far as this letter relates to submitting a proposal for this work, it may be disregarded.

13. August 8, 1933, plaintiff wrote the supervising architect as follows:

> We are proceeding with the installation of new cable for the electroliers under protest and will submit, upon completion, a statement showing the extra cost for which we will ask reimbursement.
>
> Our basis for making this claim is that it is not our interpretation of Paragraph 1373 of the specifications that we shall install a new cable, replacing the one which is now installed.
>
> This is demanded by the City Electrician, and, in order to abide by our completion schedule, we are complying with this demand.

Plaintiff took no appeal from the ruling of defendant's construction engineer to the head of the department.

14. Paragraph 28 of the specifications reads as follows:

> *Interpretations.*—The decision of the contracting officer or his authorized representative as to the proper

interpretation of the drawings and specifications shall be final. The Supervising Architect is the duly authorized representative of the contracting officer.

15. In compliance with the instructions of the supervising architect, plaintiff installed 785 feet of cable at a cost of $331.52. A claim therefor, plus 10 per cent profit and 10 per cent overhead, was submitted to the Comptroller General on November 17, 1933, which was by him denied on April 26, 1934.

Plaintiff's fourth claim

16. The contract drawings showed certain carved stone cornice work and certain vertical fluting in small scale. These drawings contained the only information with reference to the carved stone given by defendant to plaintiff, or to other bidders, prior to the submission of bids. After the contract was entered into and plaintiff had awarded its stone subcontract, defendant furnished plaintiff detailed drawings and models for carved stone. These drawings and models showed that the frieze design and the vertical fluting design had been enriched and elaborated to some extent as contrasted with the work shown on the contract drawings, which added to the cost of ornamental cornice work and vertical fluting.

17. The models causing the disputed additional costs for carving are designated in the correspondence as "A," "B," "C," and "D," and sometimes by numbers 1, 2, 3 and 4. October 5, 1932, the subcontractor of the stonework submitted to plaintiff a statement of the additional costs caused by the alleged increased work shown by models "A," "B," "C," and "D," in the amount of $2,326.40, which with overhead and profit totalled $2,814.94. October 10, 1932, plaintiff wrote to the supervising architect and requested approval of the additional costs for carving as described in the letter of October 5, 1932, just referred to.

18. November 9, 1932, the supervising architect wrote plaintiff as follows:

> Reference is made to your letter dated October 10 forwarded in the construction engineer's letter dated October 17, requesting additional compensation in the amount of $2,814.94 for extra stone carving at the Daven-

port, Iowa, Post Office, due to the models and full size details being more intricate than the work shown on the contract drawings.

Paragraph 23 states:

"The general character of the detail work is shown on the contract drawings, but minor modifications may be made in the full size drawings or models. The contractor shall not get out any part of the work requiring full size drawings or models until he has received the same."

A comparison of the photographs enclosed in your letter with the ¾″ scale details on contract drawing T-201 leads to the conclusion that the changes indicated in models "A" and "C" were such as to come within the provisions of paragraph 23; and your claim does not appear to be justified.

As indicated in photograph "B" of model No. 2, it appears that additional members have been added, necessitating additional work on the part of your subcontractor.

A proposal covering additional work in connection with model No. 2 will be considered upon presentation.

19. April 18, 1933, plaintiff wrote the supervising architect a letter, the first part of which reads in part as follows:

> With further reference to your letter of November 9, 1932, in which you state that our claim for extra stone carving at the Davenport Post Office does not appear to be justified, with the exception of Model No. 2, which is the subject of a revised claim as of this date, we respectfully request that you give further consideration to Items "A," "C," and "D" * * *.

Plaintiff claimed extra cost of $802.76 on account of these items, including overhead and profit.

April 19, 1933, plaintiff wrote the supervising architect a letter, the first part of which reads in part as follows:

> In answer to your letter of November 9, 1932, referring to our letter of October 10, 1932, and other data on the subject of our request for additional compensation for extra stone carving, and with particular reference to the last paragraph of your letter of November 9, 1932, we herewith respectfully request your approval of the additional cost of the carving on Model #2, * * *.

Plaintiff in this letter submitted a claim on Item "B," or #2, with overhead and profit added, aggregating $1,287.92.

20. September 18, 1933, the supervising architect wrote the plaintiff a letter, which reads as follows:

> In connection with your contract for construction of the Post Office at Davenport, Iowa, reference is made to your proposal dated April 19, 1933, for additional carving on model No. 2, in amount $1,287.92.
>
> You are advised that this matter was submitted for consideration under the provisions of Section 320 of the Economy Act, but approval has been withheld and your proposal is therefore rejected.

Plaintiff took no appeal from any of the rulings of the supervising architect to the head of the department.

The court decided that the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

This suit is to recover damages for delays and for the cost of extra work alleged to have been done in connection with the construction of a Post Office and Court House at Davenport, Iowa.

1. Defendant's first defense is that the claim is barred by the statute of limitations.* The building was occupied by the defendant on September 21, 1933, and on that date the work was complete except for remedying certain defects, including those in the panelling of the courtroom. All defects were corrected to the satisfaction of the defendant in the fall of 1935. Final voucher was signed by plaintiff on July 20, 1936, which was paid shortly thereafter. This suit was not filed until April 5, 1941, about seven and one-half years after substantial completion of the building and about five and one-half years after the building had been finally accepted. The defendant says that the statute began to run on the date the defendant occupied the building, but it is clear under our decisions that it did not begin to run until the work was finally completed and final voucher was presented. *Pink* v. *United States*, 85 C. Cls. 121; *Austin Engineering Co.* v. *United States*, 88 C. Cls. 559.

*36 Stat. 1139; U. S. Code, Title 28, section 262.

Although plaintiff is not barred by the statute, its long delay in making claim needs explanation, and none is offered. Plaintiff signed its final voucher on July 20, 1936; neither at that time nor since has it presented any demand to any of defendant's administrative officers. They had no inkling that plaintiff thought it had a claim until this suit was filed, nearly six years later. Had plaintiff believed it had a meritorious claim, it would seem it would have presented it when it signed its final voucher, or if not then, certainly long before it did. This casts on plaintiff a somewhat heavier burden in proving its case than usual.

2. Plaintiff's first claim is for delays in furnishing models for bronzework, for stonework and for woodwork. The testimony relative thereto is very unsatisfactory. Plaintiff did not put on the stand its superintendent who was on the job until it was almost finished, a Mr. Urban—perhaps because he was not readily available—but sought to prove its case, first, by its president, who could give practically no testimony except from records or from what someone had told him, and, second, by what it calls its contract engineer, who handled the home office end of the job and who toward the end of the job succeeded Mr. Urban as superintendent.

We have reviewed this testimony and we agree with the commissioner that from it we cannot determine how much of the delay in the stonework was due to the defendant's failure to furnish models promptly and how much was due to the delay of plaintiff's subcontractor; and it is also impossible to tell how much the delay in furnishing models for the woodwork delayed the completion of the building.

Nor, omitting for the moment the contracting officer's letter of January 10, 1934, are we satisfied with the proof as to the extent of the delay in furnishing models for the bronze spandrels. Plaintiff says it was ready for the spandrels on November 29, 1932, but that they did not arrive until January 18, 1933. On this proof alone it bases its claim of a delay of 50 days. This proof is not sufficient to show a delay in final completion of 50 days; certainly it is not sufficient to show defendant caused it. There is no proof the work was at a standstill during this time, nor the extent to which it was slowed down; on the contrary, plaintiff's president said that

"we used a little ingenuity and got around the fact that we were delayed on the spandrels." He was asked, "Do you think the erection of that wall was delayed fifty days because you did not have the spandrels." He answered, "Evidently it was not because we went past it." He would not hazard a guess as to how much they were delayed.

There is no other proof of the extent of the delay, unless it is the letter of the supervising architect of January 10, 1934, on which plaintiff relies to show a delay of not less than 25 days.

On October 25, 1933, plaintiff wrote the supervising architect requesting an extension of 50 days due to the delay in the delivery of the spandrels. On January 10, 1934, the supervising architect replied in part as follows:

> * * * We do not have knowledge as to how much the delay with regard to the spandrels affected the entire completion of the building but as there was a slowing up of the work between the last of November and January of about 5%, it is considered that the contract as a whole was delayed for twenty-five (25) days, due note of which will be made at time of final settlement.

As defendant says, this is not a finding that the completion of the building was delayed 25 days on account of delay in the delivery of the spandrels, nor is it a finding that the defendant was responsible for any delay there may have been. The supervising architect expressly says, "We do not have knowledge as to how much the delay with regard to the spandrels affected the entire completion of the building." Without this knowledge he could make no finding on the extent of the delay due to the tardy delivery of the spandrels, and he does not undertake to do so. He says there was a delay of 25 days because "there was a slowing up of the work between the last of November and January of about 5%." Why there was a slowing up, he does not say, but he does say he does not know how much of it was caused by delay in delivery of the spandrels.

We know there was some delay due to rain and cold weather during this time and we know the contractor was claiming a delay during this period on account of defendant's delay in furnishing the models for certain stonework. Some

or all these things may have contributed to a slowing up of the work. Some or all of them the supervising architect may have taken into consideration. At any rate, he expressly refuses to place the cause of the delay on the tardy arrival of the spandrels alone.

Moreover, the supervising architect does not find whether their tardy arrival was due to defendant's delay in furnishing plaintiff's subcontractor with the models or was due to the subcontractor's delay in fabricating the stone.

There is no proof as to the extent of the delay, if any, caused by defendant's tardiness in furnishing the models for these spandrels. Plaintiff is not entitled to recover on this claim.

3. Plaintiff's second claim is for the cost of a new cable to connect electroliers placed in the sidewalk in the front of the building. The supervising architect ruled that paragraph 1373 of the specifications required plaintiff to do this. Paragraph 28 of the specifications provides:

> The decision of the contracting officer or his authorized representative as to the proper interpretation of the drawings and specifications shall be final. * * *

Therefore, under *Plumley* v. *United States*, 226 U. S. 545, there can be no recovery on this claim.

4. The third claim is abandoned by plaintiff.

5. Plaintiff's fourth claim is for carving required on the stone work alleged to be in addition to that required by the contract drawings.

The contract drawings showed this carving in small scale. Later, after plaintiff had sublet this part of the contract, the defendant furnished plaintiff detailed drawings and models for the stonework. Plaintiff claims that models "A," "B," "C," and "D" (sometimes designated as models 1, 2, 3 and 4) required work in addition to that shown or indicated on the contract drawings. Claim therefor was submitted to the supervising architect on October 10, 1932. On November 9, 1932, the supervising architect ruled that models "A" and "C" came within the provisions of paragraph 23 of the specifications, reading in part, "The general character of the detail work is shown on the contract drawings, but minor

modifications may be made in the full size drawings or models." As to model "B," or 2, he said, "it appears that additional members have been added, necessitating additional work on the part of your subcontractor. A proposal covering additional work in connection with model No. 2 will be considered upon presentation."

Plaintiff submitted a proposal of $1,287.92 on April 19, 1933, for the extra work required by model No. 2. No action was taken on this until September 18, 1933, after the work had been done. On this date the supervising architect wrote plaintiff in part:

> You are advised that this matter was submitted for consideration under the provisions of section 320 of the Economy Act, but approval has been withheld and your proposal is therefore rejected.

Section 320 of the Economy Act of June 30, 1932 (47 Stat. 382, 412) reads:

> Authorizations heretofore granted by law for the construction of public buildings and public improvements, whether an appropriation therefor has or has not been made, are hereby amended to provide for a reduction of 10 per centum of the limit of cost as fixed in such authorization, as to projects where no contract for the construction has been made. As to such projects where a contract has been made at a cost less than that upon which the authorization was based, such cost shall not, unless authorized by the President, be increased by any changes or additions not essential for the completion of the project as originally planned.

The defendant says this action of the supervising architect in rejecting the claim is final under paragraph 28 of the specifications, since no appeal therefrom was taken to the head of the department. Paragraph 28 of the specifications makes the contracting officer's interpretation of the drawings and specifications final. This interpretation he gave November 9, 1932, holding that model No. 2 did require additional work. His letter of September 18, 1933, rejecting the claim, was not an interpretation of the drawings or specifications, but was a construction of section 320 of the Economy Act. On such matters he is not the final arbiter, nor is the head of the department.

Article 15 of the contract makes the decisions of the contracting officer final on "all disputes concerning questions of fact arising under this contract," subject to appeal. Whether section 320 of the Economy Act barred plaintiff from being paid the cost of doing this admittedly additional work was neither a question of fact nor a dispute "arising under this contract." Defendant did not deny plaintiff was entitled to additional compensation under the contract; it admitted it was, but it asserted that section 320 of the Economy Act prevented its being paid. Such a decision is not binding on the parties nor on us.

Defendant does not dispute the amount of plaintiff's bill.

Plaintiff is entitled to recover on this claim the sum of $1,287.92. Judgment against the defendant will be rendered therefor. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

FRED R. COMB COMPANY v. THE UNITED STATES

[No. 45457. Decided October 4, 1943]

On the Proofs

Government contract; first decision of contracting officer reversed on appeal to head of department not final.—Where plaintiff, contractor, appealed from adverse decision of the contracting officer to the head of the department, who considered plaintiff's appeal, sustained its contention and reversed the decision of the superintendent of construction and contracting officer, and directed plaintiff to submit its claim for extra costs on the regular Government voucher form, supported by a statement of facts, through the office of the superintendent of construction and the contracting officer; and where plaintiff, in accordance with the decision of the head of the department, submitted its voucher as directed, supported by extended findings of fact by the supervising construction engineer and the contracting officer sustaining plaintiff's claim; and where these findings of fact were approved by the head of the department; it is *held* that plaintiff is entitled to recover.

Same.—The first decision of the contracting officer, adverse to plaintiff's claim, was not final nor conclusive, under paragraph 4 of the specifications which provided that the contracting officer should be the interpreter of the specifications, where it was further provided under Article 15 of the contract that all decisions of the contracting officer, including interpretations of the specifications, were subject to written appeal to, and review by, the head of the department, whose decision was final and conclusive upon the parties to the contract.

The Reporter's statement of the case:

Mr. M. Walton Hendry for plaintiff. *Mr. Bernard J. Gallagher* was on the brief.

Mr. Grover C. Sherrod, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

In this case plaintiff seeks to recover $2,746.85, representing the net extra cost to it of furnishing temporary heat for buildings constructed by it under a contract with defendant at the Blackfeet Indian Agency at Browning, Montana, during 1936 and 1937.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff, a Minnesota corporation, entered into a contract with the United States March 2, 1936, by E. J. Armstrong, Acting Commissioner of Indian Affairs, for the construction of a hospital, doctors' house, nurses' quarters, and garage at Blackfeet Indian Agency, Browning, Montana, in strict accordance with specifications, schedules, and drawings, for the consideration of $170,660. The work was completed and accepted May 3, 1937, within the time allowed. The contract is plaintiff's exhibit 1 and the specifications are plaintiff's exhibit 2. These and other exhibits hereinafter mentioned are made a part of the findings by reference.

2. Article 15 of the contract provided as follows:

> *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer, subject to written appeal by the con-

tractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

3. Paragraphs 4 and 6 of the specifications were as follows:

4. INTERPRETATION OF CONTRACT. Unless otherwise specifically set forth, the Contractor shall furnish all materials, labor, etc., necessary to fully complete the work according to the true intent and meaning of the drawings and specifications, of which intent and meaning the Commissioner of Indian Affairs shall be the interpreter. Except when otherwise indicated, no local terms or classifications will be considered in the interpretation of the contract or the specifications forming a part thereof.

6. TEMPORARY HEAT. The Contractor shall furnish heat to prevent injury to work or material through dampness or cold. At all times where there is concrete not thoroughly set, and after starting to apply the first coat of plastering, he shall maintain a temperature of at least 40 degrees F. For ten days previous to the placing of interior wood finish, and during the time that varnish is being applied, a temperature of at least 70 degrees F. shall be maintained in the building. If steam lines are available from an existing system belonging to the United States, temporary heat may be obtained by connecting the radiators for the building to the present system at such points as designated by the Superintendent of Construction. All connections shall be made by the Contractor at his own expense, but the necessary steam for heat shall be furnished by the Government, after the building is fully enclosed, at no expense to the Contractor.

If there is no existing system to connect to, the Contractor shall provide sufficient heat by connecting up the boiler to be installed in the building, or by other means as approved by the Superintendent of Construction. * * *

4. In the fall of 1936, when the building was enclosed and ready for temporary heat, plaintiff wrote a letter on October 31 to defendant's supervising construction engineer, as follows:

Under Par. 6 of the Standard General Conditions, it is provided that, "If steam lines are available from any existing system belonging to the United States, tem-

porary heat may be obtained by connecting the radiators for the building to the present system at such points as designated by the Superintendent of Construction. All connections shall be made by the Contractor at his own expense, but the necessary steam for heat shall be furnished by the Government, after the building is fully enclosed, at no expense to the Contractor."

Steam lines are available, namely the 4″ ones serving the Agency Office, and the 6″ ones serving the carpenter shop.

We asked your representative on the site to designate the points at which we could connect. We were unable to secure designation of these points, and were compelled to make other arrangements for temporary heating. We shall have to make claim for this expense. If you still wish to designate these points for connection, and can assure us of a continued supply of steam under pressure to meet our needs, we shall arrange to make the connections.

If you deem this impractical, we should be glad to provide steam by using the new boilers at the lowest possible cost, and allow credit for the estimated cost of temporary connections and insulation.

Kindly let us know promptly your wishes in this matter.

5. November 4, 1936, defendant's supervising construction engineer wrote plaintiff as follows:

This will acknowledge your letter of October 31st citing paragraph 6 of the Standard General Condition section of the specifications for the hospital buildings, F. P. 374, Blackfeet Indian Agency, Browning, Montana, which provides that if steam lines are available from an existing system belonging to the United States, temporary heat may be obtained by connecting the radiators for the building to the present system at such points as designated by the Superintendent of Construction, stating that steam lines are available, namely the 4″ ones serving the agency office and the 6″ ones serving the carpenter's shop at the Blackfeet Agency, that our representative at the site was unable to designate the points at which you might make connections and that if you are unable to secure such designation for temporary heat, you shall make claim for the expense of temporary heat.

This is to advise that the existence of a steam main does not constitute an existing system from which temporary heat may be obtained. The size of the boiler in

addition to the distance between its location and the hospital buildings make it impracticable to consider this boiler for furnishing steam for temporary heat at the hospital buildings.

We feel that you have no justification for such a claim as these facts could have and should have been determined prior to the submission of your proposal in accordance with paragraph 18 "Visit to the Site" of the specifications. It will, therefore, be necessary for you to provide temporary heat at your own expense in accordance with the further provisions of paragraph 6 "Temporary Heat" of the specifications by making use of the boilers you are installing in the hospital building.

6. The plaintiff's reply November 7, 1936, to the supervising construction engineer, stated in part as follows:

> The existence of a steam main may not constitute existence of an existing system from which temporary heat may be obtained. However, the Specifications make the obligation for furnishing steam contingent upon the availability of steam lines from an existing system belonging to the United States, and not upon the existence of a system with appropriate size boiler, etc. Steam lines <u>are</u> available from <u>an</u> existing system, and the obligation <u>exists</u>.

7. The decision of defendant's supervising construction engineer, set out in finding 5, was approved by the contracting officer, and plaintiff was advised of such approval December 23, 1936.

8. January 2, 1937, plaintiff appealed in writing from the decision of the contracting officer to the Secretary of the Interior, the head of the department concerned.

9. July 20, 1937, the head of the department, in a letter to plaintiff's attorney, reversed the decision of the contracting officer referred to in finding 7. In the last paragraph of this letter the head of the department gave directions as follows:

> However, as I advised the Fred R. Comb Company in my letter of March 5, it will be necessary for the contractor to submit his claim on the regular Government voucher form, supported by a statement of facts, through the Office of the Supervising Construction Engineer, who will certify the vouchers and forward them to the Office of Indian Affairs for transmission to the General Accounting Office for settlement. * * *

10. As directed, plaintiff did submit its "claim on the regular Government voucher form, supported by a statement of facts." After plaintiff's claim had been carefully examined by the supervising construction engineer and the contracting officer, extended findings of fact were made by the contracting officer, E. J. Armstrong, Acting Commissioner of Indian Affairs. These findings of fact were approved by the head of the department. The last paragraph of the findings of fact reads as follows:

> It has, therefore, been determined from the facts that the contractor is entitled to recover, as damages, the sum of $2,746.85 of the $2,764.04 claimed.

11. In order to provide temporary heat, plaintiff utilized the boilers it had installed, under the contract, and provided the coal and labor to operate them at a cost to it of $3,964.04. The cost of connecting to the available steam system owned by the defendant would have been $1,200, reducing plaintiff's claim for cost of temporary heat to $2,764.04, against which defendant was entitled to a credit of $17.19, leaving the sum of $2,746.85, which the head of the department found to be due plaintiff in the findings of fact referred to in the preceding finding.

12. Plaintiff's claim as approved by the head of the department in the sum of $2,746.85 was transmitted for payment to the Comptroller General, who disallowed it.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

There is no controversy in this case with reference to the facts. They show that the amount of $2,746.85 was an expense incurred and paid by plaintiff for temporary heat in excess of the amount which it would have been required to pay under the contract had defendant's officers complied with the provisions of paragraph 6 of the specifications as set forth in finding 4. The contracting officer and the head of the department so decided in their final findings upon plaintiff's protest and appeal under article 15 of the contract. Paragraph 6 of the specifications provided with reference to temporary heat that "If steam lines are available from an

existing system belonging to the United States, temporary heat may be obtained by connecting the radiators for the building to the present system at such points as designated by the Superintendent of Construction. All connections shall be made by the Contractor at his own expense, but the necessary steam for heat shall be furnished by the Government, after the building is fully enclosed, at no expense to the Contractor. If there is no existing system to connect to, the Contractor shall provide sufficient heat by connecting up the boiler to be installed in the building, or by other means as approved by the Superintendent of Construction." When it became necessary to furnish temporary heat, the steam lines from the existing heating system belonging to the defendant were available. Plaintiff made due and proper application to defendant's superintendent of construction for permission to make connection with defendant's steam lines but the defendant's superintendent declined to permit plaintiff to do so on the ground that, although the steam lines were available, the size of defendant's boiler, in addition to the distance between its location and the hospital buildings, made it impracticable to consider this boiler for furnishing steam for temporary heat at the buildings. There was nothing in the contract which conditioned the right of plaintiff to connect to the available steam lines of the defendant on the size of the boiler used by defendant to supply heat through the steam lines. Plaintiff protested this ruling to the contracting officer, the Commissioner of Indian Affairs, and insisted that it was entitled under the contract to make connection with the existing steam lines of defendant for the purpose of providing temporary heat. The contracting officer in his first decision of December 23, 1936, on this protest sustained the ruling of the superintendent of construction denying plaintiff the right to make connection to the steam lines, and plaintiff duly appealed to the head of the department. The head of the department, who was the Secretary of Interior, considered plaintiff's appeal, sustained its contention, and reversed the decision of the superintendent of construction and the contracting officer, and directed plaintiff, as set forth in finding 9, to submit its claim for the extra costs

on the regular government voucher form, supported by a statement of facts, through the office of the supervising construction engineer and the contracting officer for transmission to the General Accounting Office for settlement in due course. This decision of the head of the department was made July 20, 1937. The contract had been completed and the work accepted May 3, 1937. The controversy arose during the progress of the work and plaintiff's appeal to the head of the department was filed before the work was completed, but final decision was not made thereon until after the work had been completed and accepted. In accordance with the decision of the head of the department, plaintiff submitted its voucher as directed, and the supervising construction engineer and the contracting officer made extended findings of fact thereon sustaining plaintiff's claim and finding that it was entitled to payment of the net amount of $2,746.85, and these findings of fact were approved by the head of the department.

The Comptroller refused to pay plaintiff the extra costs incurred under the contract and determined as aforesaid, on the sole ground that the first decision of the contracting officer of December 23, 1936, which plaintiff appealed to the head of the department, was final and conclusive under paragraph 4 of the specifications which provided that the contracting officer should be the interpreter of the specifications. This decision was clearly erroneous for the reason that it gave no consideration or effect whatsoever to the provision under article 15 of the contract which provides that all decisions which included interpretations, of the contracting officer were subject to written appeal and review by the head of the department, and that in case of appeal the decision of the head of the department would be final and conclusive upon the parties to the contract. See *Fred R. Comb Co.* v. *United States*, No. 45600, decided this day; *post* page 259.

Judgment will be entered in favor of plaintiff for $2,746.85. It is so ordered.

MADDEN, *Judge*; WHITAKER, *Judge*; and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

ELSIE S. SCHIFFMAN AND LAWRENCE B. GOLDSMITH, FORMER EXECUTORS, IN THEIR OWN RIGHT AND TO THE USE OF ELSIE S. SCHIFFMAN, SOLE BENEFICIARY, OF THE ESTATE OF ROBERT L. SCHIFFMAN, v. THE UNITED STATES

[No. 45555. Decided October 4, 1943. Plaintiffs' motion for new trial overruled December 6, 1943]

On the Proofs

Estate tax; claim against estate at time of decedent's death refinanced by beneficiary not deductible for estate tax purposes.—Where a claim against the estate of decedent, at the time of decedent's death, was refinanced by beneficiary and not at any time or in any amount paid by the estate or allowed as a claim against it, such claim was not deductible from the gross estate in determining the net estate for purpose of the estate tax; and plaintiffs are not entitled to recover.

Same; an estate is a separate tax entity under the estate tax statute.—The estate tax statute makes the estate of a decedent a separate and distinct taxable entity and deals with it as such; the estate is the taxpayer and the statute requires the taxpayer to pay a tax upon the net value of the property which the estate receives as a transfer by death, after deducting the amount of *bona fide* debts and claims which are allowed by the laws of the jurisdiction under which the estate is administered.

Same; net estate for tax purposes.—The net estate, for estate tax purposes, consists of such property as the estate, under applicable local laws and the terms of the will, if any, is entitled to keep and distribute to the heirs, legatees, or trustees.

Same.—While there may be cases in which an estate would be entitled to claim and take a deduction on account of a debt of the decedent which was paid by the beneficiary rather than directly by the estate (*Cf. Stone* v. *White*, 301 U. S. 532), it is *held* that the instant suit is not such a case.

The Reporter's statement of the case:

Mr. Theodore B. Benson for plaintiffs.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for defendant. *Mr. Robert N. Anderson* and *Mr. Fred K. Dyar* were on the brief.

Plaintiffs ask judgment for $3,764.49, alleged overpayment of estate tax and interest collected September 1, 1938,

with interest from date of payment. The question is whether, in determining the value of the net estate for the purpose of the estate tax, there should be deducted from the value of the gross estate the whole or any part of a debt of a corporation for which the decedent was jointly and severally liable at the time of his death, but no part of which was ever paid by the estate or constituted a charge or claim against the estate upon settlement and distribution thereof.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiffs are the former executrix and executor, respectively, of the estate of Robert L. Schiffman, a resident of Huntsville, Alabama, who died January 10, 1936. Elsie S. Schiffman is the widow of the decedent and the sole beneficiary under his will. Plaintiffs duly qualified as executrix and executor, respectively, and acted as such until May 11, 1937, when, it appearing that all the assets of the estate had been transferred to and accepted by Elsie S. Schiffman and she as sole beneficiary consenting, a decree of final settlement was entered in the Court of Probate for Madison County, Alabama. The executrix and executor were thereupon discharged.

2. March 8, 1937, plaintiffs filed an estate tax return for the estate of the decedent in which they reported a gross estate of $118,723.34. The return also showed deductions of $326,257.80 in which was included as debts of the decedent two claims by the Commonwealth Life Insurance Company in the principal amount of $308,714.10, which had been filed as creditor's claims against the estate in the Court of Probate. Since the amount of the claimed deductions exceeded the gross estate, no tax was shown due and none was paid at that time.

3. The two claims of the Commonwealth Life Insurance Company referred to in the preceding finding arose as a result of two mortgage loans to the Huntsville Hotel Company on notes dated September 20, 1929, and May 12, 1930. The first note of September 20, 1929, recited in part that "On the 20th day of September, 1930, We promise to pay to

COMMONWEALTH LIFE INSURANCE COMPANY, or order, the sum of Two hundred seventy-five thousand and no/100 Dollars." The note was secured by a first mortgage on the property of the Huntsville Hotel Company and it was signed by the Huntsville Hotel Company, by T. T. Terry, President. Payment of the note and interest thereon was jointly and severally guaranteed by L. B. Goldsmith, M. M. Hutchens, R. E. Smith, T. T. Terry, Robert L. Schiffman [decedent], J. E. Pierce, and W. M. Stanley.

The second note of $45,000 was likewise secured by a mortgage on the property of the Huntsville Hotel Company and it was signed by the Huntsville Hotel Company, by T. T. Terry, President. This note was endorsed by all the individuals who guaranteed payment of the other note except R. E. Smith. The $308,714.10 above mentioned represented the principal of the notes after collection by the Insurance Company of $11,285.90 from the estate of R. E. Smith.

4. The Huntsville Hotel Company was incorporated April 19, 1928, to build and own a hotel in Huntsville, Alabama, to be known as the Russel Erskine Hotel, a name given to it in honor of a leading citizen of Huntsville. The incorporators and directors were the individuals who guaranteed payment of the note of $275,000 referred to in the preceding finding, except J. E. Pierce, and all of them were prominent business and professional men in Huntsville.

5. Construction of the hotel building was begun in 1928 and was completed January 3, 1930. The actual costs of the land, building, and furnishings to January 31, 1931, were: land $57,729.93, building $399,151.52, and furnishings $89,403.21, that is, a total of $546,284.66. The costs were financed by the sale of approximately $200,000 of preferred stock of the Huntsville Hotel Company and the placing of two mortgages on the property to secure the notes of $275,000 and $45,000 heretofore referred to.

6. March 12, 1929, while the building was in process of construction, an agreement of lease was entered into between the Huntsville Hotel Company and one Roland M. Meyer whereby the building was to be completed by the Huntsville Hotel Company and, upon completion, was to be operated by Meyer as the Russel Erskine Hotel and as a

member of the Meyer chain of hotels which was known to be a substantial operator. Under the terms of the lease which was dated May 9, 1929, and referred to in the agreement of March 12, 1929, Meyer agreed to pay rent on the basis of actual cost of the hotel property not to exceed $560,000, in an amount equal to 6½ percent of actual cost for each of the first two years and graduated up to 9½ percent for the last five years of a thirty-year lease. It was agreed that the cost of furniture and fixtures should be approximately $80,000. Meyer agreed to pay all property taxes up to $7,500 a year and three-fourths of such taxes as might be in excess of $7,500. Special assessment taxes were to be paid by the Huntsville Hotel Company but were to be added to the cost basis for determining the amount of rent. Meyer further agreed to pay fire and tornado insurance as required by the mortgagee. The City of Huntsville agreed to furnish water free for the first five years of the lease. Meyer agreed to subscribe and pay for $25,000 of the preferred stock of the Huntsville Hotel Company, of which $20,000 was to be pledged for the performance of the lease agreement.

7. The lease was forfeited in July 1930 and the following notation made thereon:

> It is mutually agreed that this contract is canceled, and pledged stock forfeited, and is to be delivered to the Huntsville Hotel Company, Inc. (Signed) Russel Erskine Hotel Company, By Roland Meyer, President.

The hotel was thereafter operated by the Huntsville Hotel Company under the name of the Russel Erskine Hotel.

8. At the time construction of the hotel was begun and when the lease heretofore referred to was executed, business conditions in the Huntsville area were good and both of the other hotels in Huntsville were operating to capacity. An investment in the hotel at that time, particularly under the favorable lease which was executed with a well-known hotel operator, appeared to be good. The hotel guests were largely traveling men and some tourists. However, when the hotel opened in January 1930 at the beginning of the depression, there were very few traveling men and practi-

cally no tourist trade. As a result, in July 1930 Meyer forfeited his lease as heretofore shown. Business conditions generally continued bad in Huntsville from 1930 until 1937, when the first substantial improvement was shown. Four of the eight textile mills in Huntsville ceased operations during that period, and the farming business in the surrounding area was in a depressed condition. During 1933, 1934, and 1935 only one-half of the hotel was in use and five of the floors were closed. During the period 1930 to 1935, inclusive, the hotel was operated at a substantial loss for each of those years, such losses ranging from $15,701.02 to $31,966.19 after deductions for taxes, interest, and depreciation. The hotel showed an operating deficit at December 31, 1935, of $195,356.72.

The Huntsville Hotel Company was not able to pay the interest on the notes of $275,000 and $45,000 heretofore referred to, and the directors who had endorsed them were each required to pay $19,200 from July 1930 through January 1935. These directors took notes from the hotel company for the amounts so advanced.

9. The total amount of outstanding preferred and common stock of the Huntsville Hotel Company at the date of decedent's death was 1650⅔ shares of preferred and 1921½ shares of common stock. The number of shares held by endorsers of the notes of the Commonwealth Life Insurance Company, heretofore referred to, was as follows:

	Common	*Preferred*
R. L. Schiffman	265½	57⅔
R. E. Smith Estate	230	100
L. B. Goldsmith	208	83⅔
M. M. Hutchens	178	3⅓
W. M. Stanley	193½	31
T. T. Terry	37½	81
	1112½	356⅔

10. Shortly after the death of decedent the Commonwealth Life Insurance Company filed claims against his estate in the aggregate amount of $326,222.23, such amount representing the two notes heretofore referred to of $45,000 plus unpaid interest of $875, and $275,000 plus unpaid interest of

$5,347.23. In both cases interest was computed to January 10, 1936, the date of decedent's death.

Similar action was taken in the case of the estate of R. E. Smith, one of the other individuals who guaranteed payment of the note for $275,000 and who had died previously. That estate was determined to be insolvent and in a proceeding in the Circuit Court of Madison County, Alabama, involving the insolvent estate, the Commonwealth Life Insurance Company was permitted to share in the assets remaining for distribution among the creditors. On that basis the Commonwealth Life Insurance Company received $11,285.90 which it credited against the amount due on the note.

11. At the same time the officials of the Commonwealth Life Insurance Company were demanding payment of the mortgage notes in full. The endorsers of the notes were willing to turn over the hotel building to the insurance company if they could be relieved of personal liability on account of their endorsements but the insurance company declined to accept a settlement of that character. After negotiations extending over several months, a settlement was finally agreed upon in March 1937 under which the life insurance company agreed to renew the loans for $200,000 and take as security therefor a first mortgage of $175,000 on the hotel property and the personal endorsement of four of the original endorsers (L. B. Goldsmith, M. M. Hutchens, T. T. Terry, and W. M. Stanley) for $25,000. Elsie S. Schiffman, at the same time, advanced $100,000 in cash to the Huntsville Hotel Company which it used in payment of a part of the balance remaining due on the two notes. The Hotel Co. and the four endorsers above mentioned borrowed a sufficient amount to pay the balance in excess of $200,000 due as principal and interest on these notes. In consideration of her loan of $100,000, Elsie S. Schiffman received a second mortgage on the hotel property, the loan to be paid off in installment payments beginning on March 15, 1942. The four guarantors of the note of $25,000, referred to above, also entered into a contract of guaranty dated March 15, 1937, with Elsie S. Schiffman which recited that since she had consented to lend the Huntsville Hotel Company the sum of $100,000 the guarantors jointly and severally guaranteed the payment of

four-fifths of each installment of the principal and four-fifths of each installment of the interest on that loan.

At the time of these negotiations and at the date of decedent's death the value of the hotel property was not in excess of $175,000.

12. March 15, 1937, after the negotiations referred to above had been completed, the Commonwealth Life Insurance Company filed with the Probate Court of Madison County, Alabama, a written withdrawal of its claim against the estate and requested "that the same not be considered as a claim against the estate of the said Robert L. Schiffman, deceased, nor as a liability in any way to be considered in the settlement of said estate". The estate of Robert L. Schiffman did not pay any part of the claim of the Commonwealth Life Insurance Company and it was not allowed as a claim by the Probate Court.

13. Upon audit of the estate tax return referred to in finding 2, the Commissioner in letters to the estate on February 24, 1938 and June 22, 1938, disallowed the deduction of $308,714.10 claimed in the return as debts of the decedent and, as a result, determined a deficiency against the estate of $4,341.56. After a further credit which reduced the deficiency to $4,332.12 and after appropriate assessment, plaintiffs paid the deficiency with interest of $353.69 on September 1, 1938, that is, a total of $4,685.81.

14. March 25, 1939, plaintiffs filed a claim for refund on account of the estate tax and interest paid as shown in the preceding finding, and assigned as a ground therefor the failure of the Commissioner to allow any part of the deduction which had been disallowed as shown in the preceding finding.

Thereafter plaintiffs filed three other claims on account of the same payment of tax and included therein a similar ground for recovery. The Commissioner rejected the claims February 17, 1941.

15. The gross estate of $118,723.34 returned by the estate as mentioned in finding 2, and as finally determined by the Commissioner, included $110,184.85 on account of proceeds of life insurance of $150,184.85 not receivable by the estate.

The court decided that the plaintiffs were not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The essential facts in this case are that the decedent was a large stockholder in the Huntsville Hotel Company which had constructed a large hotel at Huntsville, Alabama. After the hotel was completed in January 1930, the Hotel Company borrowed $320,000 from the Commonwealth Life Insurance Company and gave as security a mortgage on the hotel property and two mortgage notes in the amounts of $275,000 and $45,000, respectively, the payment of which notes was jointly and severally guaranteed by the decedent and others, as stated in finding 3.

The Hotel Company suffered losses in the operation of the hotel and was unable to pay anything on the principal of the $320,000 loan, or to pay the interest thereon. The individual guarantors borrowed and paid $19,200 interest on the loan from July 1930 through January 1935. The Hotel Company gave them its promissory notes for the amount of interest so paid. No interest appears to have been paid after that time until the refinancing arrangement March 15, 1937, hereinafter mentioned. One of the guarantors, R. E. Smith, died, and the Insurance Company, mortgagee, filed a claim against his estate for the indebtedness of the Hotel Company to it, and collected $11,285.90 from the Smith estate. This left $308,714.10 due on the principal of the debt of the Hotel Company for which with accrued interest the surviving five guarantors were jointly and severally liable to the Insurance Company. Robert L. Schiffman, one of the guarantors, died January 10, 1936. On that date the unpaid principal and interest of the mortgage notes of the Hotel Company to the Commonwealth Life Insurance Company amounted to $314,936.33 after deducting the $11,285.90 collected from the Smith estate, and the value of the hotel property was $175,000. Finding 10. Soon after the death of Schiffman the President and other officials of the Insurance Company went to Huntsville and demanded payment of the mortgage notes in full. Conferences and negotiations for a refinancing of the balance of the mortgage loan

and interest were begun and carried on with the results as set forth in findings 11 and 12. At the time of his death, the decedent Schiffman's proportionate share, (one-fifth) of the principal and interest of the mortgage indebtedness of $146,158.56 remaining after deducting $11,285.90 collected from the Smith estate and the value of the hotel building of $175,000, was $29,231.71. Plaintiffs claim that this amount was an allowable deduction and should now be allowed from the gross estate, in addition to the other deductions allowed by defendant, in determining the value of the net estate upon which the estate is required by the statute to pay an estate tax under section 301 (a) of the Revenue Act of 1926 and section 303 (a) (1) of that act as amended by section 403 of the Revenue Act of 1934.* In support of their claim to this deduction, plaintiffs argue first, that the measure that Congress has elected to use in section 301 (a), *supra*, for the imposition of the estate tax is the value at death of the net estate transferred and that that which is to be determined as the measure of the tax is the actual value of the net estate so transferred, namely, the actual value of assets of the decedent less *bona fide* debts of the decedent and claims against him at the time of death as are allowed by the law of the local jurisdiction; second, that a claim against an estate is one allowable in the probate court and the entire amount of such a claim, whether or not actually allowed by the probate court and actually paid by the estate, is deductible from the gross estate; third, that the test, whether a debt of the decedent is deductible in determining the value of the net estate for the purpose of the excise tax upon the transfer by death, is whether the claim or debt, at the time of death, is valid and enforceable against the decedent or his estate; fourth, that it is not important to the deductibility of the debt that it was not formally allowed by the probate court in settlement of the estate; that the settlement of the decedent's debt outside the probate court, which resulted in it being withdrawn by the creditor as a claim against the estate, did not affect its enforceability; that it was not reduced or compromised, but the Insurance Com-

*44 Stat. 9, 69; 48 Stat. 680, 753.

pany collected in full, and it is immaterial from whom it was collected, since it collected substantially the net amount, for which the decedent was liable at the time of his death, from Elsie Schiffman, the person equitably liable therefor; and fifth, that it is not material to the right of the estate to the deduction of the decedent's proportionate share of the total debt that the $100,000 was paid on the mortgage debt by the beneficiary of the estate rather than by the estate itself.

Under the facts and circumstances of this case, we are of opinion that there has been no overpayment and the estate is not entitled to recover. The measure of the estate tax is not simply the value of assets less liabilities of the decedent at the time of his death. That is only the starting point. What subsequently happens with reference to debts of and claims against the decedent may be important. The statute makes the Estate a separate and distinct taxable entity and deals with it as such. The Estate is the taxpayer and the statute requires it to pay a tax upon the net value of the estate which it receives as a transfer by death, after deducting the amount of *bona fide* debts and claims "as are allowed by the laws of the jurisdiction * * * under which the estate is being administered," and which it is entitled to keep and distribute to the beneficiaries or trustees according to local law and the terms of the will. That was the net estate which the defendant subjected to the tax in this case. While there may be cases where an estate would be entitled to claim and take a deduction on account of a debt of the decedent where such debt was paid by the beneficiary rather than directly by the estate, *Cf. Stone* v. *White*, 301 U. S. 532, we do not find this to be such a case. In this case it is not shown that either the estate or the beneficiary ever unconditionally paid or remained liable to the Commonwealth Life Insurance Company for any amount on the decedent's guarantee on the mortgage notes of the Huntsville Hotel Company to the Insurance Company, in connection with which the deduction is claimed.

The decedent had, in addition to other assets, life-insurance policies on his own life in the amount of $150,184.85. These policies were not payable to the estate and appear to

have been payable directly to Elsie Schiffman, the widow of decedent. The amount of $110,184.85 of this insurance was subject to the tax as a part of the estate, and the balance of $40,000 was exempt. Upon Schiffman's death, the Commonwealth Insurance Company demanded of all of the interested parties payment in full of the mortgage notes of the Hotel Company, and the accrued interest, and filed a claim therefor with the estate of Schiffman. Schiffman's estate and the other surviving guarantors were solvent and worth their proportionate shares of the indebtedness then due the Insurance Company in excess of the value of the hotel property of $175,000, and the amount previously collected from the Smith estate. After negotiations between the interested parties, a refinancing arrangement was agreed upon and carried out March 15, 1937, as set forth in finding 11. Under this transaction neither the estate nor Elsie Schiffman actually paid out unconditionally any amount on the decedent's guarantee. Elsie Schiffman simply made a loan of $100,000 out of her funds to the Hotel Company, repayment of $80,000 of which, and interest thereon, was guaranteed by others, and for the total loan and the balance thereof of $20,000 she took the note of the Hotel Co., and a second mortgage for $100,000 payable in installments beginning March 15, 1942. It is not claimed that under the circumstances the $20,000 indebtedness of the Hotel Company to Mrs. Schiffman on the total loan was worthless. Certainly she did not consider it so. In any event, that would not make it deductible by the estate since no payment as such was made by or on behalf of the estate on account of the claim made against it by the Insurance Company and later withdrawn.

Plaintiffs cite a number of cases in support of their contentions. We have studied them and find them to be distinguishable on the facts.

Plaintiffs are not entitled to recovery and the petition is dismissed. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

FRED R. COMB CO. v. THE UNITED STATES

[No. 45600. Decided October 4, 1943]

On the Proofs

Government contract; defendant bound by decision, on appeal, of head of department, under terms of contract in suit.—Where upon adverse decision of contracting officer on plaintiff's claim for extra compensation, plaintiff appealed to the head of the department who reversed the decision of the contracting officer and approved plaintiff's claim; it is *held* that under the terms of the contract defendant is bound by the decision of the head of its department and plaintiff is entitled to recover.

Same; provisions of contract not in conflict must be so construed as to give effect to each.—Where paragraph 4 of the specifications provided that the contracting officer should be the final interpreter of the drawings and specifications but did not provide that his interpretation thereof should be final and subject to review neither by his superior nor the courts; and where Article 15 of the contract specifically provided that the decision of the contracting officer should be subject to appeal to the head of the department on disputes arising out of the contract; the two provisions must be construed together so as to give effect to each.

Same.—Paragraph 4 of the specifications is not in conflict with Article 15 of the contract; it is axiomatic that effect must be given to all parts of the contract and no provision should be construed as being in conflict with another unless no other reasonable interpretation is possible.

Same; Government bound by decision of arbiter selected by it.—Except in rare cases, such as a suit by the contractor for damages, or in case of fraud or mistake, the defendant is and should be bound by the decision of the person the Government selected to make final decisions. Cf. *Arthur W. Langevin* v. *United States*, *ante*, p. 15.

The Reporter's statement of the case:

Mr. Bernard J. Gallagher for the plaintiff. *Mr. M. Walton Hendry* was on the briefs.

Mr. G. C. Sherrod, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a corporation organized and existing under the laws of the State of Minnesota, with its principal place

of business in Minneapolis, Minnesota, and is engaged in construction work.

2. March 2, 1936, the plaintiff entered into a contract with the United States, by E. J. Armstrong, Acting Commissioner of Indian Affairs, for the construction of a hospital building, doctors' house, garage and nurses' quarters at Crow Creek Indian Agency, Crow Creek, South Dakota, in strict accordance with the specifications, schedules, and drawings, for the consideration of $116,628.00. The work was completed and accepted within the time allowed, on January 29, 1937.

3. Article 15 of the contract reads as follows:

> *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

4. Paragraphs 4 and 6 of the specifications read as follows:

> 4. INTERPRETATION OF CONTRACT.—Unless otherwise specifically set forth, the Contractor shall furnish all materials, labor, etc., necessary to fully complete the work according to the true intent and meaning of the drawings and specifications, of which intent and meaning the Commissioner of Indian Affairs shall be the interpreter. Except when otherwise indicated, no local terms or classifications will be considered in the interpretation of the contract or the specifications forming a part thereof.
>
> 6. TEMPORARY HEAT.—The Contractor shall furnish heat to prevent injury to work or material through dampness or cold. At all times where there is concrete not thoroughly set, and after starting to apply the first coat of plastering, he shall maintain a temperature of at least 40 degrees F. For ten days previous to the placing of interior wood finish, and during the time that varnish is being applied, a temperature of at least 70 degrees F. shall be maintained in the building. If

steam lines are available from an existing system belonging to the United States, temporary heat may be obtained by connecting the radiators for the building to the present system at such points as designated by the Superintendent of Construction. All connections shall be made by the Contractor at his own expense, but the necessary steam for heat shall be furnished by the Government, after the building is fully enclosed, at no expense to the Contractor.

If there is no existing system to connect to, the Contractor shall provide sufficient heat by connecting up the boiler to be installed in the building, or by other means as approved by the Superintendent of Construction. * * *

5. The plaintiff, in the fall of 1936 when the building was enclosed and ready for temporary heat, wrote a letter dated October 31, 1936, to defendant's supervising construction engineer, as follows:

> Under Paragraph 6 of the Standard General Conditions, it is provided that, "If steam lines are available from any existing system belonging to the United States, temporary heat may be obtained by connecting the radiators for the building to the present system at such points as designated by the Superintendent of Construction. All connections shall be made by the Contractor at his own expense, but the necessary steam for heat shall be furnished by the Government, after the building is fully enclosed, at no expense to the Contractor."
>
> Steam lines are available, namely the 3″ ones now serving the Agency office and other nearby buildings. We asked your representative on the site to designate the points at which we could connect. We were unable to secure designation of these points, and were compelled to make other arrangements for temporary heat ing. We shall have to make claim for this expense. If you still wish to designate these points for connection, and can assure us of a continued supply of steam under pressure to meet our needs, we shall arrange to make the connections.
>
> If you deem this impractical, we should be glad to provide steam by using the new boilers at the lowest possible cost, and allow credit for the estimated cost of temporary connections and insulation.
>
> Kindly let us know promptly your wishes in this matter.

6. November 4, 1936, defendant's supervising construction engineer replied as follows:

> This will acknowledge your letter of October 31st citing paragraph 6 of the Standard General Condition section of the specifications for the hospital buildings, F. P. 409–412, Crow Creek Indian Agency, Fort Thompson, South Dakota, which provides that if steam lines are available from an existing system belonging to the United States, temporary heat may be obtained by connecting the radiators for the buildings to the present system at such points as designated by the Superintendent of Construction, stating that steam lines are available, namely the 3″ ones serving the Agency office and other nearby buildings at the Crow Creek Agency, that our representative at the site was unable to designate the points at which you might make connections and that if you are unable to secure such designation for temporary heat, you shall make claim for the expense of temporary heat.
>
> This is to advise that the existence of a steam main does not constitute an existing system from which temporary heat may be obtained. The size of the boiler in addition to the distance between its location and the hospital buildings make it impracticable to consider this boiler for furnishing steam for temporary heat at the hospital buildings.
>
> We feel that you have no justification for such a claim as these facts could have and should have been determined prior to the submission of your proposal in accordance with paragraph 18 "Visit to the Site" of the specifications. It will, therefore, be necessary for you to provide temporary heat at your own expense in accordance with the further provisions of paragraph 6 "Temporary heat" of the specifications, by making use of the boilers you are installing in the hospital building.

7. The third paragraph of the plaintiff's reply, dated November 7, 1936, reads as follows:

> The existence of a steam main may not constitute existence of an existing system from which temporary heat may be obtained. However, the Specifications make the obligation for furnishing steam contingent upon the availability of steam lines from an existing system belonging to the United States, and not upon the existence of a system with appropriate sized boiler, etc.

Steam lines are available from an existing system, and the obligation exists.

8. The decision of the defendant's supervising construction engineer, set out in finding 6, was approved by the contracting officer, and plaintiff was advised of such approval December 23, 1936.

9. January 2, 1937, the plaintiff appealed in writing from the decision of the contracting officer to the Secretary of the Interior, the head of the department concerned.

10. July 20, 1937, the head of the department in a letter to plaintiff's attorney reversed the decision of the contracting officer referred to in finding 8. In the last paragraph of this letter the head of the department gave directions as follows:

> However, as I advised the Fred R. Comb Company in my letter of March 5, it will be necessary for the contractor to submit his claim on the regular Government voucher form, supported by a statement of facts, through the Office of the Supervising Construction Engineer, who will certify the vouchers and forward them to the Office of Indian Affairs for transmission to the General Accounting Office for settlement. * * *

11. As directed, plaintiff did submit its "claim on the regular Government voucher form, supported by a statement of facts." After plaintiff's claim had been carefully examined by the supervising construction engineer and the contracting officer, extended findings of fact were made by the contracting officer, E. J. Armstrong, Acting Commissioner of Indian Affairs. These findings of fact were signed and approved by Oscar L. Chapman, Assistant Secretary of the Interior. The last paragraph of the findings of fact reads as follows:

> It has, therefore, been determined from the facts that the contractor is entitled to recover as damages the sum of $983.58 of the $987.02 claimed.

12. In order to provide the temporary heat plaintiff utilized the boilers that it had installed under the contract, and plaintiff provided the coal and labor to operate them at a cost to it of $1,483.58. The cost of connecting to the avail-

able steam system owned by the defendant would have been $500, reducing plaintiff's claim for cost of temporary heat to $983.58, which the head of the department found to be due plaintiff in the findings of fact referred to in the preceding finding.

13. Plaintiff's claim as approved by the head of the department in the sum of $983.58 was transmitted for settlement to the Comptroller General, who disallowed it.

14. The cost to plaintiff of furnishing the temporary heat was $983.58.

The court decided that the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

Many times in this court the Government has defended a suit on the ground that the claimant had failed to pursue his contractual remedy of appealing to the head of the department from an adverse ruling of the contracting officer, but this is the first case that has been presented to us in which the Government has taken the position that the contractor has not even this remedy and that the contracting officer's decision is final and subject to review not even by his superior in the department.

The plaintiff had a contract for the building of a hospital and appurtenant buildings at the Crow Creek Indian Agency, Crow Creek, South Dakota. The specifications contained this provision with reference to temporary heat for the building:

> * * * If steam lines are available from an existing system belonging to the United States, temporary heat may be obtained by connecting the radiators for the building to the present system at such points as designated by the Superintendent of Construction. * * *

When the contractor required heat for the building it asked the Superintendent of Construction to designate the places at which it could tap the existing heating system supplying heat to the Agency office building. The Superintendent of Construction refused it permission to tap this system at all, claiming that it was inadequate to supply heat for both the

office building and the hospital. Plaintiff appealed to the Supervising Construction Engineer, who likewise denied the permission sought. From this decision plaintiff appealed to the Commissioner of Indian Affairs, who affirmed the decisions below.

In the meantime plaintiff was required to provide temporary heat by other means. It presented a claim for the extra cost thereof, but this claim was denied. It appealed finally to the Secretary of the Interior, who reversed the action of the Commissioner of Indian Affairs and his subordinates and held that plaintiff should have been allowed to connect with the existing system, and that, having been denied this permission, it was entitled to the extra cost of furnishing the temporary heat itself. The amount of this extra cost was determined to be the amount claimed by plaintiff, less the sum of $3.44, a net amount of $983.58.

The defendant says that the specifications make the Commissioner of Indian Affairs the interpreter of the intent and meaning of the drawings and specifications and that his interpretation thereof is final and conclusive on the plaintiff and that it is not entitled to the remedy provided for by article 15 of the contract, which provides for an appeal to the head of the department from decisions of the contracting officer on "disputes concerning questions arising under this contract."

In justice to Government counsel it should be said that this position is but half-heartedly advanced. It was the position taken by the Comptroller General when he denied the claim. It is patently unsound.

Paragraph 4 of the general conditions of the specifications did make the Commissioner of Indian Affairs, who was the contracting officer, the interpreter of the intent and meaning of the drawings and specifications, but it did not say that his interpretation thereof should be final and subject to review neither by the courts nor by his superior. It must be read in connection with another provision of the contract, of which it is a part, to wit, article 15 of the contract, which provides for an appeal to the head of the department from the decisions of the contracting officer on disputes

concerning questions arising under the contract. Effect must be given, of course, to all parts of the contract; no provision should be construed as being in conflict with another one unless no other reasonable interpretation is possible. This is axiomatic. Paragraph 4 of the general conditions of the specifications is not in conflict with article 15 of the contract. Paragraph 4 makes the Commissioner of Indian Affairs the interpreter of the meaning of the specifications, but it does not make his interpretation final and conclusive; it does not say that there shall be no appeal therefrom to the head of the department.

The provisions of article 15 of the contract apply to such disputes as well as others. It is clear that the contractor in this case did have a right to appeal to the head of the department.

The head of the department has ruled that plaintiff is entitled to the extra expense to which it was put for furnishing temporary heat over and aove what it would have cost it had it been permitted to connect with the existing system. The question for decision by defendant's representatives, of course, was whether or not there was an available existing system from which temporary heat could have been obtained. The Commissioner of Indian Affairs held there was not, but the head of the department overruled him and held that there was. The defendant does not here deny that an existing system was available; it merely says that it was for the Commissioner of Indian Affairs to determine this question and not for the head of the department. We hold this is incorrect and that the defendant is bound by the decision of the head of its department in this case.

We do not mean to say that in a proper case the decision of the head of the department is not subject to review by this court, but in a case such as this one, where defendant offers no proof to show the decision is erroneous, it certainly should be bound by it. The decision was by its own officer, selected by it to make final decisions, binding on the contractor. The defendant is in no position to contend that a decision adverse to it should not bind it also. Except in

rare cases, such as a suit by the contractor for damages, or in case of fraud or mistake, the defendant is and should be bound by the decisions of the person it selected to make final decisions. Cf. *Arthur W. Langevin* v. *United States*, No. 43903, *ante*, page 15.

Judgment will be rendered for the plaintiff in the sum of $983.58. It is so ordered.

Madden, *Judge;* Littleton, *Judge;* and Whaley, *Chief Justice*, concur.

Jones, *Judge*, took no part in the decision of this case.

FREDRICK RODIEK, ANCILLARY EXECUTOR OF THE WILL OF JOHN F. HACKFELD, DECEASED, v. THE UNITED STATES

[Congressional No. 17745. Decided October 4, 1943]

On the Proofs

Enemy-owned property sold by Alien Property Custodian under "Trading with the Enemy Act."—Report to the Senate in accordance with Senate Resolution 229, May 10, 1934, and Section 151 of the Judicial Code (U. S. Code, Title 28, Section 257).

The Reporter's statement of the case:

Mr. Reuben D. Silliman for plaintiff. *Messrs. Thos. P. Gore* and *William R. Rodenberg* were on the brief.

Mr. Harry Le Roy Jones, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant. *Messrs. Frederick Bernays Wiener, Richard J. Connor, Frederick L. Smith*, and *George A. McNulty* were on the brief.

March 28, 1934, a Bill for the relief of the Estate of John F. Hackfeld was introduced in the Senate of the United States which authorized and directed the Secretary of the Treasury to pay "to the estate of John F. Hackfeld, deceased, the sum of $3,000,000 in full settlement of all claims against the Government for injuries sustained growing out of the sale of the assets of H. Hackfeld and Company, Limited, a

Hawaiian corporation, of which said John F. Hackfeld was the principal stockholder, by an order of the Alien Property Custodian of the United States." May 10, 1934, this Bill was, by Senate Resolution 229, referred to this court for hearing and report of the facts under Section 151 of the Judicial Code (Title 28, U. S. Code, Sec. 257).

The Executor of the Estate of John F. Hackfeld duly filed a petition in this court and a large volume of oral and documentary evidence has been taken and submitted by the parties. After the case was first briefed for submission to the court, it was remanded upon motion of the defendant for the taking of further proof by both parties. The case was later briefed and submitted in January 1943.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. The plaintiff, Fredrick Rodiek, is a citizen of the United States and the duly qualified and acting ancillary executor of the will of John F. Hackfeld, deceased, by appointment of the Surrogate's Court of the County and State of New York.

CITIZENSHIP OF JOHN F. HACKFELD

2. John F. Hackfeld was born in Grueppenbuehren, Oldenburg, Germany, December 26, 1856, and upon the organization of the German Empire became a citizen or subject of Germany. He died in Bremen, Germany, August 27, 1932. He went to Honolulu, Hawaii, in 1877 and upon his arrival there he was employed as a clerk in the firm of H. Hackfeld & Co., and in 1881 he became a partner in that firm. John F. Hackfeld married in Germany in 1888, and in that year returned to Honolulu with his wife and bought a home in which they resided until October 1900. In 1897 the partnership of H. Hackfeld & Co., was incorporated as H. Hackfeld & Co., Ltd., and John F. Hackfeld was made vice president. He became president of the company in 1903 which position he held until January 1918.

John F. Hackfeld was present and had his residence in Germany from October 10, 1887, until April 1, 1888. He left Hawaii on May 9, 1893, went to Germany and returned to

Hawaii on October 7, 1893. He claimed, in representations to officials of the United States in 1923 and 1924, to have lost his status as a German subject by reason of ten years' continuous absence from Germany prior to the year 1888. A German national lost his German citizenship by a continuous absence from Germany for a period of more than ten years under Section 21 of the German Citizenship Law of June 21, 1870, which was in force from its date to 1913, and read as follows:

> North Germans who have left the territory of the North German Federation lose their citizenship through continuous sojourn abroad for a period of ten years. The mentioned period is counted from the day when the territory of the Federation is left or, if the person relinquishing the citizenship is in possession of travelling papers or of a certificate of domicile, from the day the validity of such papers expires. Entry upon the records of a German consulate interrupts the ten-year period. It begins again the day following the cancellation of the entry in the records of the consulate.
>
> Loss of citizenship occurring in this manner applies also to the wife and such minor children as are under paternal control, provided the wife and such children live with the husband or father, respectively.
>
> North Germans who have lived continuously for at least five years in a foreign state and have acquired its citizenship may be granted by treaty a reduction of the ten-year period to one of five years regardless of whether the interested persons were in possession of travelling papers or certificates of domicile.
>
> North Germans who have lost their citizenship through ten years' sojourn abroad without acquiring any other citizenship may be granted citizenship in the state in which they were formerly domiciled even if they do not take up residence in such state.
>
> North Germans who have lost their citizenship through ten years' sojourn abroad and intend to return to the territory of the North German Federation, acquire the citizenship in the state of the Federation in which they have established their residence, through a document of reception issued by the higher administrative authority, which, upon request, must be furnished them.

John F. Hackfeld was never absent from Germany for a continuous period of ten years following October 18, 1877,

the date on which he left Germany for the first time to go to Hawaii.

3. The marriage agreement of John F. Hackfeld dated at Braunschweig, Germany, March 19, 1888, stated that "The betrothed, being bound for Honolulu after their marriage, where the future husband has his business, the husband having also German nationality, however, considering Bremen as his true domicile to which the couple will eventually return if the business of the husband will allow them to do so, it is agreed upon and between them that the community of goods of the city of Bremen shall apply in regard to the property of the husband, present and future, personal and real, inherited and acquired."

The climate of Hawaii affected the health of Mrs. Hackfeld and in October 1900, on the order of her doctor, Mr. and Mrs. Hackfeld with their two daughters left Honolulu for Germany. There Mrs. Hackfeld was placed under the care of specialists and for a number of years spent most of her time in sanatoriums. She never recovered her health sufficiently to leave Germany. She is still alive and resident in Germany. From 1900 until the outbreak of the World War in August 1914, John F. Hackfeld spent about half of his time in Honolulu, Hawaii, engaged chiefly in directing the affairs of the business firm of which he was the head. His trips to Honolulu and return were as follows:

Departure from Germany for Honolulu:	Arrival in Germany from Honolulu:
Oct. 29, 1901.	May 27, 1902.
Sept. 9, 1902.	Feb. 12, 1903.
Jan. 30, 1904.	Aug. 23, 1904.
Nov. 8, 1904.	June 8, 1905.
Jan. 23, 1906.	July 11, 1906.
Sept. 15, 1908.	July 20, 1909.
Jan. 6, 1912.	Feb. 8, 1913.
June 10, 1913.	May 19, 1914.

Before his arrival in Germany on his last trip, he was booked to return to Honolulu in October 1914, on the steamship "Columbus," but was prevented from doing so by the outbreak of the World War and the sickness of his wife.

4. John F. Hackfeld supported the overthrow of the Monarchy in Hawaii and the establishment of the Republic in 1894. In the early part of 1895 he became a member of the Citizens' Guard of Honolulu to suppress the counter-revolution to overthrow the Republic of Hawaii. He was in active service as a member of the Citizens' Guard for several months. The certificate of active service is plaintiff's exhibit 3. He was identified with the American party of the Republic, which had as its objective the ultimate annexation of Hawaii to the United States.

December 21, 1894, John F. Hackfeld was granted a certificate by the Minister of the Interior of the Republic of Hawaii, as follows:

REPUBLIC OF HAWAII,
DEPARTMENT OF THE INTERIOR.

> I, James A. King, Minister of the Interior of the Republic of Hawaii, do hereby certify that Johann F. Hackfeld, aged 38, born at Grand duchy of Oldenburg, Germany, by occupation a merchant, who has resided in the Hawaiian Islands seventeen years, and whose present residence is at Honolulu, Oahu, having filed with me the Certificate of proofs required by the Constitution and having taken the Oath to support the Constitution and Laws of the Republic, is entitled, so long as he shall remain domiciled in the Republic, to all the privileges of Citizenship without thereby prejudicing his native Citizenship or allegiance.
>
> In witness whereof I have set my hand and Official Seal, this 21st day of December, A. D. 1894.
>
> [SEAL] J. A. KING,
> *Minister of the Interior.*

5. Section 1 of Article 17 of the Constitution of the Republic of Hawaii, entitled "Citizenship," provided as follows:

> SECTION 1. All persons born or naturalized in the Hawaiian Islands and subject to the jurisdiction of the Republic are citizens thereof.

Section 2 of Article 17 of the Constitution of the Republic of Hawaii, entitled "Special Rights of Citizenship," provided as follows:

> SECTION 2. Any person not a Hawaiian citizen, who took active part, or otherwise rendered substantial serv-

ice in the formation of, and has since supported the Provisional Government of Hawaii, who shall within six months from the promulgation of this Constitution procure from the Minister of the Interior a certificate of such service, as herein set forth; and who shall take an oath to support this Constitution and the laws of the Republic so long as he shall remain domiciled in the Republic, shall be entitled to all the privileges of citizenship without thereby prejudicing his native citizenship or allegiance.

The act of the Legislature of the Republic of Hawaii of June 15, 1896 (Civil Laws of Hawaiian Islands, 1897, Sections 1570–1578), entitled "An Act to prescribe the procedure in proceedings for naturalization of aliens", provided in part as follows:

Section 1. An alien may be admitted to become a citizen of the Republic of Hawaii in the following manner, and not otherwise:

He shall file a petition in writing verified by oath with a Justice of the Supreme Court.

Section 2. He must set forth in his petition:

1. That he has resided in the Hawaiian Islands for not less than two years.

2. That he intends to become a permanent citizen of the Republic of Hawaii.

* * * * *

9. That he has taken the oath prescribed in Article 101 of the Constitution of the Republic of Hawaii.

* * * * *

Section 4. The petitioner shall at or before the time of his application to be admitted to citizenship, declare upon oath and subscribe to the same, that he renounces and abjures all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty, of which he was before a citizen or subject, whether by birth, naturalization or otherwise, and that he will bear true allegiance to the Republic of Hawaii. Such oath may be administered by any person authorized to administer oaths.

Section 5. The petitioner shall be required to prove all the allegations of his petition to the satisfaction of the Justice hearing his application, and said Justice is hereby authorized to examine the petitioner upon oath and to summon and examine such witnesses as he may

deem essential as to the possession by the petitioner of the qualifications set forth in his petition.

SECTION 6. Upon compliance with all the requirements of this Act, the petitioner shall be entitled to receive a certificate of naturalization in such form as may be prescribed by the Justices of the Supreme Court, under the hand of the Justice hearing the petition, impressed with the seal of the Supreme Court and attested by a clerk thereof.

SECTION 7. The petition, the oath prescribed by Section 4 of this Act, a copy of the certificate of naturalization, and a concise statement of the evidence adduced shall be preserved among the records of the Supreme Court.

* * * * *

SECTION 9. If the petitioner shall have received from the Minister of the Interior a certificate of service as authorized and set forth in Section 2 of Article 17 of the Constitution of the Republic of Hawaii, he shall not be required to allege in his petition his possession of the qualifications set forth in Section 2 of this Act, but he shall allege in his petition the receipt of such certificate and shall exhibit the same, or in case of loss a certified copy of the same, to the Justice hearing his application. In all other respects his petition shall comply with the provisions of this act.

6. Section 4 of the Act of Congress entitled "An Act to provide a government for the Territory of Hawaii," approved April 30, 1900 (31 Stat. 141; Tit. 8, U. S. C., Sec. 4*), provided that "All persons who were citizens of the Republic of Hawaii on August 12, 1898, are hereby declared to be citizens of the United States and citizens of the Territory of Hawaii."

John F. Hackfeld did not become a naturalized citizen of the Republic of Hawaii under the constitution and laws of the Republic of Hawaii, and he did not become a citizen of the United States by the terms of Section 4 of the Hawaiian Organic Act of April 30, 1900, *supra*. He remained at all times until his death on August 27, 1932, a subject or citizen of Germany.

7. January 28, 1918, the property owned by John F. Hackfeld in Hawaii, consisting of 4,969 shares of the capital stock

* Repealed; see U. S. Code, Title 8, section 601.

of J. F. Hackfeld, Ltd., together with certain other minor items with which these findings are not concerned, was seized, as hereinafter more fully set forth, by the Alien Property Custodian of the United States (hereinafter sometimes referred to as the Custodian), under the Act of Congress known as the Trading with the Enemy Act, approved October 6, 1917 (40 Stat. 411). The property so seized from John F. Hackfeld by the Custodian, or the proceeds received therefrom by the Custodian, were deposited and held in an account known in the office of the Custodian as Trust 12640.

8. During the First World War, John F. Hackfeld with his family lived and was resident in Germany. He was sympathetic to the German cause during the war. He was not required by the German authorities to register during the war; he was not questioned as to his citizenship, and none of his property was seized by the German authorities. Hackfeld maintained an office in Bremen, Germany, and carried on some business activities. Part of the time during the war he was physically incapacitated and underwent three major surgical operations.

9. May 3, 1923, John F. Hackfeld made application for the first time under the Act of June 5, 1920 (41 Stat. 977), to the Custodian for the return to him of $10,000 of his property. October 9, 1923, he made application to the Custodian for the return of all of his property. Subsequently his duly authorized attorney was told by a minor official in the office of the Alien Property Custodian that the claim was of such magnitude that it could not be allowed unless it were either taken to court or Hackfeld secured an American passport.

Thereafter, and in consequence of the information thus obtained, on November 9, 1923, Hackfeld made application to the United States Consul at Bremen, Germany, for a passport as a United States citizen. In support of this application for a passport, John F. Hackfeld submitted certificates by Commissioner Luerman of the Bremen Police Department, who stated that Hackfeld had lost his German citizenship by an uninterrupted absence of ten years abroad prior to 1888. Commissioner Luerman had no authority, as a matter of German law, to execute any certificate stating

such a conclusion. The facts recited in Luerman's certificates were based on an affidavit signed by Hackfeld.

February 1, 1924, Commissioner Luerman scratched the entry "citizenship—Oldenburg" on Hackfeld's 1903 Police Registration and added "nationality doubtful." This was several months after he had submitted the certificates that Hackfeld had lost his German citizenship by expatriation in 1888. In 1936, Commissioner Luerman issued a correct transcript of John F. Hackfeld's 1887 registration. This showed that Hackfeld had not in fact been absent from Germany for ten years and had not become expatriated under German law as Luerman had stated in 1923 in the certificates which were submitted to the State Department to induce the granting of a passport to Hackfeld as an American citizen and to the Alien Property Custodian and the Department of Justice to induce the return of his property.

Hackfeld's passport application was handled at the American Consulate at Bremen, Germany, by Vice Consul William G. Roll. The Vice Consul made only a cursory examination, after which he reported the application favorably and transmitted it through official channels to the State Department. Shortly thereafter John F. Hackfeld gave the Vice Consul an envelope containing $1,500 in cash for his services in expediting the Hackfeld passport application.

With this money the Vice Consul took a trip to the United States which he would not otherwise have been able to finance. Hackfeld wrote his attorney, who was then in Washington, that the Vice Consul was on his way to Washington. When the Vice Consul reached Washington John F. Hackfeld's attorney told the official in the State Department who was handling the Hackfeld passport application that the Vice Consul was in town. The Vice Consul was sent for and made oral and written reports, which reports were very favorable to John F. Hackfeld. Up to that time the State Department had been in doubt on the matter of the issuance of the passport, but after hearing from the Vice Consul and receiving his reports all doubts were dispelled, and on March 13, 1924, an American passport was issued to John F. Hackfeld.

Thereafter the Vice Consul proceeded to his home in California, and, after his return to Bremen, Germany, purchased an automobile there. He had never before owned an automobile.

10. None of the facts set forth in the preceding finding with reference to the Vice Consul's relations with John F. Hackfeld and his duly authorized attorney was known to anyone in the State Department when the passport was issued or to anyone in the Alien Property Custodian's office or the Attorney General's office when they investigated and recommended the return to Hackfeld of his property as hereinafter set forth.

11. Prior to the issuance of the passport to Hackfeld the office of the Alien Property Custodian was directed to make an investigation in Germany on the issue of Hackfeld's loyalty. After a perfunctory investigation, consisting of a single interview in Bremen, Germany, of John F. Hackfeld by the Managing Director of the office of the Alien Property Custodian, who did not interrogate Hackfeld about the facts of his claim, that office reported that he had been loyal to the United States during the war. A more complete report by H. E. Osann, European Investigator for the Trading with the Enemy Section of the Department of Justice, reporting adversely on Hackfeld's claim, and pointing out the irregularities in the Bremen police records, was subsequently forwarded to Washington, but was received after the State Department had issued a passport to Hackfeld as an American citizen.

12. The application for return of the property filed with the Custodian together with his conclusions in the matter, the findings and action of the State Department on the granting of the passport, and affidavits of John F. Hackfeld and other persons and briefs of counsel, were submitted to the Attorney General for his recommendation to the President for an order returning the property. April 12, 1924, the Attorney General found upon the record as made and then before him: First, that the certificate and act referred to in findings 4 and 6 made John F. Hackfeld a citizen of the United States; second, that he had not become expatriated; and third, that he had been loyal to the United States during

the war. The last paragraph of the Attorney General's opinion read: "It is, therefore, recommended that return of the property held be made to claimant, he being a citizen of the United States."

The principal question on the record as it then stood was citizenship, and in his determination the Attorney General was greatly influenced by and followed the State Department's action in granting the passport.

The recommendation that return of the property held be made to Hackfeld was allowed by the President April 26, 1924. Pursuant to this order, the property in the possession of the Custodian was returned to John F. Hackfeld.

13. Subsequent passports were issued to John F. Haskfeld as follows: No. 254631, June 22, 1926; No. 1356, August 1, 1928; No. 993, August 11, 1930, and renewed for two years November 25, 1932.

14. In the case of the *Heirs of Henry Hackfeld* v. *United States*, Congressional No. 12592*, John F. Hackfeld testified under oath in this court June 4, 1912, that he was a subject of Germany and that he was not a citizen of the United States. For the years 1913 to 1916, inclusive, John F. Hackfeld filed individual U. S. income tax returns and stated therein that he was a nonresident alien.

15. From the time of the seizure of his property by the Custodian on January 28, 1918, to the time of his death August 27, 1932, John F. Hackfeld's income taxes were paid to the Bureau of Internal Revenue on the basis that he was a citizen of the United States. After his death, his estate paid the estate tax on the same basis. In a suit before the Board of Tax Appeals (33 B. T. A. 1020), involving the estate tax, the issue of his residence at the time of his death was in controversy, but his citizenship was not put in issue.

16. The Executive allowance of April 26, 1924, referred to in finding 12, which ordered the return of Hackfeld's seized property, was revoked, by Executive Order No. 7162 of August 29, 1935, and the filing, on April 13, 1936, in the United States District Court for the Southern District of New York, of a suit entitled *United States et al.* v. *Fredrick Rodiek, Ancillary Executor of the Will of Johann Friedrick Hack-*

*Not reported.

feld, Deceased, Equity No. 82/373, wherein the Government sought to recover a judgment for 20% of the amount previously returned to Hackfeld in respect of his seized property. Said suit was based on the ground that, since Hackfeld was a German subject or citizen, the maximum recovery he could have had under the Settlement of War Claims Act of 1928 (45 Stat. 254) was 80% of the proceeds of his seized property.

Paragraph 1 of the Executive Order of August 29, 1935, follows:

> By virtue of and pursuant to the authority vested in me by section 5 (a) of the Trading with the Enemy Act, approved October 6, 1917 (40 Stat. 411, 415), as amended, it is ordered as follows:
>
> 1. The Attorney General of the United States is hereby vested with full power and authority to revoke or vacate any order or orders issued in favor of any claimant or claimants in purported pursuance of section 9 of the said Trading with the Enemy Act, as amended, which, in his opinion, have been made or allowed without authority of law, or as a result of misrepresentations made by any such claimant or by any authorized representative, agent, or attorney of any such claimant, or as a result of fraud on the part of any such claimant or any authorized representative, agent, or attorney of any such claimant, or as a result of collusion of any such claimant, his agent, attorney, or representative, with any officer or employee of the United States, with like effect as if the President had personally revoked or vacated such order or orders.

17. The principal issue in the suit No. 82/373 instituted in New York was the citizenship of Hackfeld, though it was alleged and proof was introduced to establish that Hackfeld secured the allowance of his claim by fraud.

After a trial before the District judge and jury, a verdict was directed for the plaintiffs in the sum of $1,604,632.25, which represented the sum erroneously returned to Hackfeld by the Custodian in 1924 plus interest to date of judgment. In directing the verdict, the court said *inter alia:*

> These two basic questions are (1) whether the Government is at liberty in this action to reopen the Executive allowance of the claim made on April 26, 1924, and

(2) whether Hackfeld was an American citizen as he asserted in the claim for the return of his property. I have decided both of these questions for the Government for the following reasons:

* * * * *

I am satisfied also that Hackfeld never considered himself other than as a German citizen. * * * I hold, therefore, that Hackfeld was not an American citizen. This was the only basis on which the claim could have been allowed when he made his application. * * *

February 17, 1941, the Circuit Court of Appeals affirmed the judgment. (117 Fed. (2d) 588.) In its opinion, the Circuit Court of Appeals said at page 594:

We are satisfied that Hackfeld was not a naturalized citizen of the Republic [Hawaii] on August 12, 1898; consequently he did not acquire United States citizenship by virtue of the Organic Act of 1900.

After affirmance of the judgment, the appellant, Rodiek, filed with the Circuit Court of Appeals a petition for rehearing, attacking, *inter alia*, the allowance of interest which was included in the judgment. In its opinion (120 Fed. (2d) 760, 761–762) the court denied the petition, and, after stating that the verdict was directed on the ground of mistake and that in the case of innocent, mutual mistake, interest should start only from date of demand for restitution, further said:

But the litigation did involve other issues. Evidence was offered tending to prove that the payments were induced by fraudulent misrepresentations. If fraud were established the payments would bear interest from the dates of their receipt by Hackfeld. (Cases cited.) * * * Although the district judge did not state what factors he considered in determining the amount of interest, he did say, in explaining to the jury his reasons for directing a verdict: "I am satisfied also that Hackfeld never considered himself other than as a German citizen." He then proceeded to specify facts which led him to that conclusion. It would appear, therefore, that he did not regard the payments as resulting from an entirely innocent mistake on the part of Hackfeld. If that be so, we cannot say on this record that he abused discretion in starting interest from the receipt of the payments.

Certiorari was granted on October 13, 1941, and on March 2, 1942, the Supreme Court by an equally divided Court affirmed the Circuit Court of Appeals without opinion. (*See Rodiek, Ancillary Executor*, v. *United States, et al.*, 315 U. S. 783.)

VALUE OF THE 4,969 SHARES OF STOCK OF J. F. HACKFELD, LTD., OWNED BY JOHN F. HACKFELD AND SEIZED BY THE CUSTODIAN JANUARY 28, 1918

18. June 15, 1912, John F. Hackfeld caused to be incorporated under the laws of Hawaii a personal holding company known as J. F. Hackfeld, Limited, for the purpose of administering his private fortune. He transferred to this corporation certain securities, receiving therefor 4,969 of the 5,000 shares of the capital stock of the corporation. Among the securities turned over by him to J. F. Hackfeld, Ltd., were 12,647 shares of the 37,000 shares of the common stock of H. Hackfeld & Co., Ltd.

H. Hackfeld & Co., Ltd., was an Hawaiian corporation capitalized for $4,000,000, represented by 40,000 shares of stock of the par value of $100, of which 37,000 shares were common and 3,000 shares preferred to the extent of 10%. When war was declared by the United States against Germany in April 1917, John F. Hackfeld, then living in Germany, was president of the corporation; George Rodiek was senior vice president and general manager; John F. Humburg was second vice president and manager of the San Francisco office; J. F. C. Hagens was third vice president, located at Honolulu; August Humburg, F. W. Klebahn, Herman P. F. Schultze, and B. von Damm were departmental managers in Honolulu, and all but von Damm were directors of the corporation. In addition, all except John F. Hackfeld were stockholders in varying amounts. On and before January 28, 1918, John F. Hackfeld's interest in the common stock of H. Hackfeld & Co., by reason of his ownership of 4,969 shares of stock in J. F. Hackfeld, Ltd., was 0.339694 thereof.

At the time the Trading with the Enemy Act was passed October 6, 1917, 14,724 shares of the capital stock of H. Hack-

feld & Co., Ltd., were owned by "enemies," as defined by that Act, and as such all 14,724 shares were subject to seizure by the Alien Property Custodian. In addition to the above-mentioned "enemy"-interest in H. Hackfeld & Co., J. F. Hackfeld, Ltd., which was enemy-controlled, held the 12,647 shares of capital stock of H. Hackfeld & Co., Ltd., which had been transferred to this holding company, as hereinbefore mentioned, by John F. Hackfeld. The holding company had a capital stock of 5,000 shares, of which John F. Hackfeld held and owned 4,969; Julie Hegeler (later Rudolphi) and Marie Hackfeld (later Feine), daughters of John F. Hackfeld, and then living in Germany with him, held 10 shares each; George Rodiek held 10 shares; and J. F. C. Hagens held 1 share. Ninety-nine percent of the stock of this company was subject to seizure by the Alien Property Custodian as enemy-owned. Mr. Hagens was the only director of this corporation resident in Hawaii during 1917 and 1918.

H. Hackfeld & Co., Ltd., was one of the five large sugar factor companies doing business in the Hawaiian Islands. In addition it conducted a merchandising business and held various agencies of steamship lines and insurance companies. As a factor it was the agent of several sugar plantations in the islands, to which it rendered various services. It made money advances, sold the principal's sugar on commission, furnished supplies under its agency contracts, on which commissions were charged, and acted as banker and adviser to the plantations which it served. It owned stock in the various plantations whose agency contracts it held and from which it derived a substantial part of its earnings.

19. The stock in H. Hackfeld & Co. Ltd., was closely held, was not traded in, and was never quoted on any stock exchange. In 1916, between March and May, John F. Hackfeld, through George Rodiek, offered 1,500 shares of stock to George, Albert, and Samuel Wilcox at $200 a share. The Wilcoxes owned a large interest in one of the Hackfeld plantations and it was deemed to be in the interest of H. Hackfeld & Co. Ltd., to have them stockholders in the factor company. The Wilcoxes bought 1,400 shares at $200, in three lots. In the fall of 1916, shares in H. Hackfeld & Co.

Ltd., were sold to certain officers and employees at $150 a share, as follows: George Rodiek, 1,000 shares; J. F. Humburg, 1,000 shares; J. F. C. Hagens, 1,000 shares; F. W. Klebahn, secretary of the company, a director, and head of the shipping department, 500 shares; H. Schultze, treasurer of the company and a director, 500 shares; A Humburg, a director and head of the merchandise department, 500 shares; B. von Damm, head of the insurance department, 250 shares. In these transfers of stock to officers and employees the consideration consisted of cash or notes secured by the stock sold and services to be rendered.

John F. Hackfeld had been active in the management of H. Hackfeld & Co. since 1881, and during the fifteen years he was head of the company it had grown to be the largest and most important business in Hawaii. He had procured as managers men recognized to be of unusual business ability. The whole organization was highly efficient. He was a man of liberal and generous tendencies and enjoyed the admiration and loyalty of every one connected with the organization.

Under the initiative and direction of John F. Hackfeld the plantations for which H. Hackfeld & Co., Ltd., was agent greatly increased their production of sugar with the resulting additions to profits. On January 28, 1918, when the Custodian seized the 4,969 shares of stock owned by John F. Hackfeld in J. F. Hackfeld, Ltd., and seized 14,724 shares of the stock of H. Hackfeld & Co., Ltd., plans had been devised by H. Hackfeld & Co., Ltd., and were in operation further to increase the production of the plantations. Likewise the merchandising department of the company had a record of growth and increased earnings and its prospects for the future were increases both in volume of business and in earnings.

20. For the year 1917, after deducting bonuses to managers in the amount of $237,380.57, the net profits of H. Hackfeld & Co., Ltd., were $1,661,624.22. The profits for the year 1916 were also large. The net earnings of H. Hackfeld & Co., Ltd., during these two war years were the highest in the history of the company. The net profits were abnormally high because of war conditions which increased the

demand for and price of sugar. The year 1917 was an unusual year in the history of the company and during this year the price of sugar was higher than it had been for past years.

21. Shortly after the United States declared war against Germany in April 1917, and subsequently, the operating company, H. Hackfeld & Co., Ltd., found itself and its business operations embarrassed by reason of certain unfavorable public reaction and opinion resulting from the German interests in and connections with the company and its alleged German sympathies.

In December of 1917, the actual management of the affairs of H. Hackfeld & Co., Ltd., was in the hands of Rodiek, Hagens, and John Humburg. Rodiek and Humburg were in San Francisco and in their absence Hagens was acting manager. Hagens became so disheartened with the situation that he cabled Humburg in San Francisco that he, Hagens, must resign. Humburg went to Honolulu to consider with Hagens the various problems faced by the company. They came to the conclusion that the best solution was to reorganize and Americanize H. Hackfeld & Co., Ltd. Humburg wrote to Rodiek January 5, 1918, that "* * * the facts are there plain to everyone that, if German controlled, we go to pieces, or if we Americanize, we maintain our position. * * *."

Hagens and Humburg finally worked out the following plan: They came to the conclusion that a sufficient number of shares of H. Hackfeld & Co., Ltd., stock held by the holding company, J. F. Hackfeld, Ltd., should be sold so that a majority of the stock would be held by Americans, and that a new board of directors be elected. They realized that the 14,724 shares of H. Hackfeld & Co., Ltd., stock directly held by enemies could not be sold by the owners thereof, but they believed that they could sell the 12,647 shares of H. Hackfeld & Co., Ltd., stock held by J. F. Hackfeld, Ltd., for the reason that these shares were not technically "owned" by an enemy, but by an American corporation, J. F. Hackfeld, Ltd. Under the bylaws of J. F. Hackfeld, Ltd., Hagens, as the sole director in Hawaii, was vested with all the powers of the entire board of directors, including the power to sell the corporate

property. Negotiations were opened with one Walter F. Dillingham and his associates for the sale to them of some of this stock. After negotiations as to price, it was finally agreed that Hagens, as sole resident director of J. F. Hackfeld, Ltd., should cause the corporation to sell to the Dillingham group 11,000 shares of the H. Hackfeld & Co., Ltd., stock held by the holding company, at a price of $180 per share. This price of $180 per snare was determined by capitalizing at twelve percent the average net earnings of H. Hackfeld & Co., Ltd., for ten preceding years. This was a fair and reasonable basis and method for determining the actual fair market value of the stock at that time.

On January 11, 1918, the final step necessary to complete this so-called January Reorganization was taken by the holding of a stockholders' meeting of the operating company, H. Hackfeld & Co., Ltd. At this meeting the positions of John F. Hackfeld as president and J. C. Isenberg as director of the company were declared vacated. George Rodiek was removed as vice president and director of the company, and the resignations of H. Schultze, August Humburg, and F. W. Klebahn as directors were tendered and accepted. A new Board of Directors was elected with J. F. C. Hagens as president and J. F. Humburg as vice president, making all the officers and directors American citizens.

22. Acting pursuant to and under authority of the Trading with the Enemy Act of October 6, 1917, the Alien Property Custodian, on January 22, 1918, appointed the Trent Trust Co., Ltd., a Hawaiian corporation, depositary of seized enemy property in the Territory of Hawaii. On January 28, 1918, upon a determination that the owners thereof were enemies within the meaning of the Trading with the Enemy Act, the Custodian, through Trent Trust Co., seized 4,989 shares of the capital stock of J. F. Hackfeld, Ltd. Of these 4,989 shares, 4,969 were those of John F. Hackfeld and 20 of said shares belonged to his two daughters, all of whom were then residing in Germany and were determined by the Custodian to be "enemies" within the meaning of the Trading with the Enemy Act of October 6, 1917. These 4,969 shares of the capital stock of J. F. Hackfeld, Ltd., were, with the exception of certain minor items not in controversy, the

only property of John F. Hackfeld which was seized by the Custodian. Likewise, on January 28, 1918, and shortly thereafter, the Custodian, through Trent Trust Company, seized the 14,724 shares of the capital stock of H. Hackfeld & Co., Ltd., which were owned directly by persons, other than John F. Hackfeld, who were also enemies within the meaning of the Trading with the Enemy Act.

John F. Hackfeld owned no stock in H. Hackfeld & Co., Ltd. The only direct stockholdings in H. Hackfeld & Co., Ltd., which the Custodian acquired were through the seizure of the above-mentioned 14,724 "enemy"-held shares. The Custodian did not seize the assets or property of either the holding company, J. F. Hackfeld, Ltd., or the operating company, H. Hackfeld & Co., Ltd.; through seizure of stock in each of these corporations the Custodian acquired merely the status of a stockholder in each company.

23. Shortly after the Custodian had seized the stock as above mentioned and for the purpose of securing the approval of the Custodian to the January Reorganization, hereinbefore mentioned, the reorganizers sent one of their number, Mr. W. F. Frear, former Governor of Hawaii and former Chief Justice of Hawaii, to see the Custodian in Washington on February 6, 1918. The Custodian refused after many conferences to give his approval to this reorganization on the ground, among others, that it was an infringement of the duties imposed upon him as Alien Property Custodian under the Trading with the Enemy Act. The reorganizers thereupon agreed, on March 4, 1918, to retransfer the stock to J. F. Hackfeld, Ltd., and this was done, the final restoration of the matter to *status quo* being completed on March 21, 1918. Following the rescission of the sale of the 11,000 shares of the stock of H. Hackfeld & Co., Ltd., in the January 11, 1918, reorganization, Frear made a second visit to Washington and on this trip was accompanied by Hagens and Humburg of H. Hackfeld & Co., Ltd. They had several conferences with the Custodian and his legal advisers. The purpose of these conferences was to induce the Custodian to carry out the theory of the January Reorganization by selling to that group certain of the enemy stock in H. Hackfeld & Co., Ltd., which he had seized. In these confer-

ences Frear, Hagens, and Humburg constantly urged upon the Custodian that $180 per share was a fair price for the common stock of H. Hackfeld & Co., Ltd. The Custodian refused to sell the enemy-held shares of stock to the January reorganizers.

Following the seizure of the stock of John F. Hackfeld in J. F. Hackfeld, Ltd., and the enemy-held stock of H. Hackfeld & Co., Ltd., and the unscrambling of the January reorganization, the Custodian caused the stock he held in J. F. Hackfeld, Ltd., to be voted for the dissolution of this company, and for the appointment of the Trent Trust Company as trustee in dissolution thereof. On June 7, 1918, the Trent Trust Company was officially appointed trustee in dissolution of J. F. Hackfeld, Ltd., by the Treasurer of Hawaii, and thereafter the affairs of J. F. Hackfeld, Ltd., were administered by and were under the control of said trustee in dissolution.

24. Subsequent to the dissolution of the holding company, J. F. Hackfeld, Ltd., about one-third of the stock in H. Hackfeld & Co., Ltd., the operating company, was held by the Custodian, one-third by the Trent Trust Company as trustee in dissolution of the holding company, and one-third by individuals who were not enemies under the Trading with the Enemy Act and whose stock was therefore exclusively under their own control and nowise under the control of the Custodian.

April 20, 1918, a group of new directors was elected to the board of H. Hackfeld & Co., Ltd. Three plans for the disposition of the affairs of H. Hackfeld & Co., Ltd., were suggested: (1) the Custodian could sell the enemy-owned and controlled stock along the lines of the January reorganization; (2) H. Hackfeld & Co., Ltd., could be dissolved and its assets sold piecemeal; and (3) the corporation could sell its entire property and business as a going concern to a new corporation to be organized under the laws of Hawaii for that purpose. The last of these three plans was suggested to H. Hackfeld & Co., Ltd., by the Custodian at a stockholders' meeting of H. Hackfeld & Co., Ltd., held July 19, 1918. This plan was embodied in a resolution adopted by the stockholders and under which it was provided that:

1. The board of directors of H. Hackfeld & Company, Limited, would organize an Hawaiian corporation to be named "American Factors, Limited", with a capital stock of $5,000,000, evidenced by 50,000 shares of the par value of $100. A proposed form of articles of incorporation was appended to the resolution.

2. H. Hackfeld & Company, Limited, would sell its entire business and assets as a going concern to the new corporation in exchange for all of the latter's stock, the assets of H. Hackfeld & Company, Limited, to be deemed of the approximate value of $7,500,000.

3. H. Hackfeld & Company, Limited, would transfer the 50,000 shares of American Factors, Limited, stock received for its assets to seven named trustees in exchange for trust certificates. The trust agreement, a copy of which was attached to the resolution, provided that the trustees were to be vested with the voting power of the stock for the period of the war and three years thereafter.

4. The board of directors of H. Hackfeld & Company, Limited, would sell the trust certificates at a fixed price of $150, with leave in the board to accept Liberty Bonds at par up to eighty percent of the aggregate price. Thus, $7,500,000 would be realized for the assets of H. Hackfeld & Company, Limited.

5. H. Hackfeld & Company, Limited, would be then disincorporated and the net proceeds of the sale distributed to its stockholders. This was done, the common stockholders receiving about $194 a share for their stock.

6. The board of directors of H. Hackfeld & Company, Limited, be authorized to do everything necessary to carry the resolution into effect.

7. During the term of the trust none but loyal citizens of the United States, approved by the trustees, could hold trust certificates, and no one person or corporation could hold more than 2,500 trust certificates. The trustees were specifically authorized to hold trust certificates on the same terms as other persons.

25. The sale, pursuant to this unanimous resolution, was carried out on August 20, 1918, and the assets of H. Hackfeld & Co., Ltd., were transferred to American Factors, Ltd.,

for the sum of $7,500,000. At this meeting of the stockholders the Custodian voted 14,724 shares of stock and the Trent Trust Company voted 12,647 shares in its capacity as trustee in dissolution of J. F. Hackfeld, Ltd. This transfer of the assets of H. Hackfeld & Co., Ltd., to American Factors, Ltd., for the sum of $7,500,000 is the basis or foundation of the complaint of the estate of John F. Hackfeld against the actions of the Alien Property Custodian and the United States. The claim herein made is that in January, July, and August 1918 the actual and fair market value of the stock and the assets of H. Hackfeld & Co., Ltd., was at least $30,000,000, and the interest of John F. Hackfeld in H. Hackfeld & Co., Ltd., being 0.339694, his estate should be paid by the United States an additional sum of $7,643,115.

26. Following the sale of its assets to American Factors, Ltd., H. Hackfeld & Co., Ltd., was dissolved and its then assets, consisting of $7,500,000 received from American Factors, Ltd., were distributed among its stockholders. One hundred and ninety-four dollars per share, exclusive of interest, is the distributive dividend which has already been paid on each share of the common stock. A small sum remains to be paid. The distributive dividends on the 12,647 shares of H. Hackfeld & Co., Ltd., stock which had been owned by the holding company prior to its dissolution were paid to the Trent Trust Company in its capacity as trustee in dissolution of J. F. Hackfeld, Ltd. The Trent Trust Company in turn distributed the assets of J. F. Hackfeld, Ltd., to the stockholders thereof, the Custodian receiving his proportionate share for the 4,969 shares of stock in J. F. Hackfeld, Ltd., which had been seized from John F. Hackfeld. This distributive dividend of $194 a share on the 4,969 shares was placed in an account in the Custodian's office designated as "Trust 12640", the bookkeeping account of all property seized from John F. Hackfeld.

27. Upon all of the evidence submitted by the plaintiff and by the defendant the court finds as facts (1) that it was a fair, reasonable, and proper method of ascertaining the value of the net assets, business, and goodwill or of the stock of H. Hackfeld & Co., Ltd., during the year 1918 to capitalize the average annual net earnings of the company for a period

of ten years prior to 1918 at a rate of 12 percentum; (2) that on January 28, July 19, and August 20, 1918 and at all other times during the year 1918, the entire net assets, business, and goodwill of H. Hackfeld & Co., Ltd., were worth no more than the amount for which they were sold pursuant to the stockholders' resolution of July 19, 1918, to-wit: $7,500,000; (3) that the transfer of the assets and business of H. Hackfeld & Co., Ltd., to American Factors, Ltd., could not have been financed at a higher figure than $7,500,000, and (4) that the actual, true, adequate and fair market value of said assets, business, and goodwill of H. Hackfeld & Co., Ltd., was not in excess of $7,500,000 on January 28, July 19, and August 20, 1918, or at any other time during 1918.

The court concluded as a matter of law that the estate of John F. Hackfeld, deceased, has no claim, legal or equitable, against the United States for the payment of any sum, and it was ordered that the foregoing special findings of fact and conclusion of law thereon be certified to the Senate of the United States in accordance with Senate Resolution 229, May 10, 1934, and Section 151 of the Judicial Code (Title 28, U. S. Code, Section 257).

H. E. HELE v. THE UNITED STATES

[No. 45473. Decided June 7, 1943]

On Defendant's Plea to the Jurisdiction

Government contract; applicable statutes are a part of the contract, and parties will not be presumed to have entered into a contract contrary to them.—Where license covering a tract of land in the Canal Zone was canceled under a provision of the contract that in case of cancellation, the value of improvements made by licensee was "to be determined in such manner as the Governor of the Panama Canal may direct;" and where under the Act of February 27, 1909, it is provided that in case of cancellation of such leases the value of improvements is "to be determined by the courts of the Canal Zone," it is *held* that the parties are conclusively presumed to have known of the provisions of the Act and they are not presumed to have entered into a contract contrary to its terms; the contractual provisions and the statutory one must be harmonized if possible.

Syllabus

Same; breach; failure to submit to Canal Zone courts question of value of improvements on leased lands repossessed a breach of contract.—Where the Government took possession of the land in the Canal Zone leased to plaintiff, it was the obligation of the defendant to submit the question of reasonable value of improvements to the courts of the Canal Zone, in accordance with the provisions of section 1308 of Title 48 of the U. S. Code; and failure to do so was a breach of contract for which plaintiff is entitled to sue in the Court of Claims.

Jurisdiction; grant of jurisdiction not exclusive of prior jurisdiction unless so expressed.—A grant of jurisdiction to one court does not deprive another court of the jurisdiction it already had, unless an intention so to do is expressed in clear language or by necessary implication; or unless the retention of jurisdiction by one tribunal be utterly imcompatible with the grant of jurisdiction to the other. *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 463, 479, cited. See also *Plaquemines Fruit Co.* v. *Henderson*, 170 U. S. 511; *Gittings* v. *Crawford*, Taney's decisions, 1, 9.

Same; exclusion of Court of Claims from jurisdiction of suits against the United States must be expressly declared or plainly implied.—Where it has been the long-standing policy of Congress that jurisdiction in suits against the United States shall be exercised by that special tribunal created by Congress to hear and determine suits against the Government, an intention to depart from that policy and to exclude jurisdiction from the Court of Claims must be evidenced expressly or by necessary implication; and it is *held* that no such intention is expressed or implied in the Act of February 27, 1909.

Same; jurisdiction of courts of Canal Zone.—Under the Act of February 27, 1909 (section 1308 of Title 48, U. S. Code), providing that where leased lands in the Canal Zone are repossessed by the United States compensation to the lessee for the reasonable value of improvements made by lessee shall be determined by the courts of the Canal Zone, no jurisdiction was expressly conferred on the courts of the Canal Zone to entertain a suit to recover for breach of contract to pay such reasonable value, and the Court of Claims has jurisdiction to hear such suit under section 145 of the Judicial Code.

Same.—If the Act of February 27, 1909, conferring certain jurisdiction on the courts of the Canal Zone, can be construed to confer on such courts jurisdiction to render judgment against the United States, it is *held* that it was not intended that such jurisdiction should be exclusive of the general jurisdiction conferred on the Court of Claims of suits against the sovereign.

Mr. James J. Lenihan for plaintiff.

Mr. William A. Stern II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The facts sufficiently appear from the opinion of the court.

WHITAKER, *Judge*, delivered the opinion of the court:

The plaintiff sues for the value of improvements on a tract of land which he leased, under an instrument designated as a license, from the Panama Canal on March 21, 1923. The license was cancelled on November 30, 1939, under a provision thereof, which reads as follows:

> The licensee agrees that if at any time it shall become necessary for the United States to occupy the whole or any portion of the land covered by this license, it shall have the right to enter upon and take possession of said land without further compensation to the licensee than the reasonable value of the improvements made by the licensee upon the said tract, the said value to be determined in such manner as the Governor of the Panama Canal may direct.

However, section 1308 of Title 48 of U. S. C., which is part of the Act of February 27, 1909, c. 224, secs. 1, 2, 3, and 5 (35 Stat. 658) provides:

> * * * all leases shall be made subject to the provision that if at any time it shall become necessary, notwithstanding, for the United States to occupy or use any portion of the leased lands, it shall have the right to so do without further compensation to the lessee than for the reasonable value of the necessary improvements made upon said tracts by the lessee, the same to be determined by the courts of the Canal Zone.

The license executed provided for determination of the value of the improvements "as the Governor of the Panama Canal may direct"; the Act authorizing the license provided for the determination of this value "by the courts of the Canal Zone."

The parties are conclusively presumed to have known of the provisions of the Act, and they are not presumed to have entered into a contract contrary to its terms. If possible, the contract must be construed to have been entered into in con-

formity with the Act. It can be so construed, and so construed it provides that, in the first instance, the value is to be determined "in such manner as the Governor of the Panama Canal may direct," but if the parties cannot agree on this value, then it is to be determined "by the courts of the Canal Zone."

When the Governor took possession of the land he determined that the value of the improvements was $818.00. Plaintiff says that this determination was grossly erroneous, and that the improvements were in fact worth $12,562.89. He refused to accept the sum offered, but the Governor did not then refer the matter to the courts as he was required to do, and he has never paid nor tendered the reasonable value, determined in the prescribed manner. Plaintiff, therefore, brings this suit to recover what he claims is the true value.

The defendant has filed a plea to the jurisdiction of this court on the ground that only the courts of the Canal Zone have the right to determine the value of the improvements and, hence, that this court has no jurisdiction of this suit.

Upon repossession of the lands, an obligation was cast on the Governor to pay the "reasonable value" of the improvements. This obligation has not been discharged, nor has the Governor made a tender of this "reasonable value." He did tender an amount which he said was the value of the improvements, but he has never tendered nor offered to pay the value fixed by the contract. That value was the reasonable value as determined by the courts of the Canal Zone. That value has never been determined and, hence, there could have been no offer to pay it.

The defendant's obligation to pay has never been discharged. It could not be discharged until the value was determined. The determination of the value was the first step toward the discharge of the defendant's obligation. It has never taken this step. It has not discharged the obligation the contract imposed upon it, and, hence, the plaintiff has a right of action in this court, under section 145 of the Judicial Code, to enforce this obligation to pay "the reasonable value" of the improvements.

Nor does the provision of section 1308 of Title 48 of the U. S. Code for the determination of this value by the courts

of the Canal Zone take away jurisdiction from this court to render judgment for defendant's breach of contract to pay the value of the improvements. It was the obligation of the defendant to submit the question of the reasonable value to the courts of the Canal Zone as a preliminary to the discharge of its obligation to pay the reasonable value as thus determined. It is for this breach of defendant's obligation to pay this value that plaintiff sues. No jurisdiction was expressly conferred on the courts of the Canal Zone to entertain a suit by the plaintiff to recover for breach of the contract to pay this reasonable value. The Act merely provided that the reasonable value was to be determined by the courts of the Canal Zone. Upon this determination the contract required the Governor to pay the value thus determined, but if he failed or refused to pay, it was not provided that the plaintiff might bring suit in the courts of the Canal Zone for this breach of contract. But it is plain that this court has such jurisdiction.

The situation is analogous to proceedings by the United States to acquire lands. If the land owner refuses to accept a sum offered, the United States must institute suit in a District Court to condemn the land. But if the Government takes the lands, without having instituted condemnation proceedings, under a promise, express or implied, to pay for the lands, and if it fails to discharge this obligation, the land owner must sue in a court of claims.

So it is here. As the first step toward the discharge of its obligation to pay the reasonable value of the improvements, the Governor was required to submit to the courts of the Canal Zone the question of the reasonable value. But if he failed or refused to do this, the plaintiff's remedy would seem to be in a court of claims for breach of contract.

But if an intention can be found in the Act to confer on the courts of the Canal Zone jurisdiction of a suit by plaintiff for breach of contract, we certainly do not think that it was intended to make this jurisdiction exclusive. It can hardly be said that when jurisdiction to render a judgment against the United States is only impliedly conferred, if at all, on a special court of limited jurisdiction, not having general jurisdiction of suits against the United States, that it

was intended to take away jurisdiction from that court especially created by Congress to hear and determine suits against the sovereign.

When the United States first consented to be sued generally, jurisdiction was not conferred on United States courts in general, but on a special tribunal created to hear and determine such suits. For thirty years it was the consistent policy of Congress to lodge jurisdiction of suits against the United States exclusively in this court. In 1887 the Tucker Act conferred on the District Courts, sitting as courts of claims, concurrent jurisdiction of suits in which the amount involved was small. But of suits of larger amounts exclusive jurisdiction remains in this court. Even of suits of smaller amounts it has concurrent jurisdiction. It remains the special tribunal for the trial of suits against the United States, that tribunal in which the sovereign was willing to consent that it be sued.

Such having been the long-standing policy of Congress, an intention to depart therefrom and to exclude jurisdiction in this court must be evidenced expressly or by necessary implication. We find no such intention expressed nor implied in the Act of February 27, 1909, *supra.*

At the time of the enactment of this Act providing for the determination of this value by the courts of the Canal Zone the only courts in existence there were courts established not by Congress, but by the Canal Commission. By the Act of April 28, 1904 (33 Stat. 429), the President was directed to take possession of and to pay for the Panama Canal. Section 2 of this Act provided:

> That until the expiration of the Fifty-eighth Congress, unless provision for the temporary government of the Canal Zone be sooner made by Congress, all the military, civil, and judicial powers as well as the power to make all rules and regulations for the government of the Canal Zone and all the rights, powers, and authority granted by the terms of said treaty to the United States shall be vested in such person or persons and shall be exercised in such manner as the President shall direct for the government of said Zone and maintaining and protecting the inhabitants thereof in the free enjoyment of their liberty, property, and religion.

Pursuant to the powers granted, the President appointed the Isthmian Canal Commission and vested in it the sweeping powers granted by the Act of 1904, *supra*, to be exercised under the supervision of the Secretary of War.

This Commission in turn "passed" "Act No. 1": "An Act to provide for the organization of a judiciary and the exercise of judicial powers in the Canal Zone, Isthmus of Panama, and for other purposes." This Act established municipal courts having the limited criminal and civil jurisdiction of like courts in the States; circuit courts having the original jurisdiction of courts of first instance in the States; and a Supreme Court having the jurisdiction enjoyed by the Supreme Courts in the States.

These were the "courts of the Canal Zone" referred to by Congress in the Act of February 27, 1909, *supra*, providing for determination of the value of the improvements by the courts of the Canal Zone. Is it to be supposed that Congress intended to give such courts, so created, jurisdiction of suits against the sovereign? There may be doubt whether such courts had the right to exercise any judicial power at all, but we are of opinion, in any event, that if Congress intended to confer on them jurisdiction of suits against the sovereign, it certainly did not intend to make that jurisdiction exclusive.

"It is a general rule," says the Supreme Court in *United States* v. *Bank of New York Co.*, 296 U. S. 463, 479, "that the grant of jurisdiction to one court does not, of itself, imply that the jurisdiction is to be exclusive. See *Gittings* v. *Crawford*, Taney's Dec. 1; *Ames* v. *Kansas*, 111 U. S. 449, 464; *Plaquemines Fruit Co.* v. *Henderson*, 170 U. S. 511, 517, 518; *Merryweather* v. *United States*, 12 F. (2d) 407, 409, 410." In that case it was insisted that the grant of jurisdiction to the District Courts "of all suits of a civil nature, at common law or in equity, brought by the United States * * *" was a grant of exclusive jurisdiction, but the Supreme Court held that it was not.

In *Ames* v. *Kansas*, 111 U. S. 449, 464, cited in *United States* v. *Bank of New York Co.*, *supra*, there is a full discussion of the question whether the constitutional grant to the Supreme Court of original jurisdiction of "all cases

affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party," was a grant of exclusive jurisdiction. In such cases the Constitution said that "the Supreme Court shall have original jurisdiction," but "in all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction." It was held that the grant was not exclusive.

In support of its opinion the court quoted from Chief Justice Taney's opinion in *Gittings* v. *Crawford*, Taney's Decisions, 1, 9, as follows:

> The true rule in this case is, I think, the rule which is constantly applied to ordinary acts of legislation in which the grant of jurisdiction over a certain subject matter to one court does not, of itself, imply that that jurisdiction is to be exclusive. In the clause in question there is nothing but mere affirmative words of grant, and none that import a design to exclude the subordinate jurisdiction of other courts of the United States on the same subject matter.

Plaquemines Fruit Co. v. *Henderson*, also cited in *United States* v. *Bank of New York Co.*, *supra*, was a suit by plaintiff, a foreign corporation, to quiet title to lands in Louisiana. A plea in bar was interposed alleging that the question had already been decided by the state courts of Louisiana in a suit brought by the State of Louisiana in which the plaintiff and defendant were parties. The plaintiff replied that the judgment of the state court was void because jurisdiction of controversies between a state and citizens of another state had been exclusively vested by the Constitution in the courts of the United States by the words of the Constitution, "The judicial power shall extend * * * to controversies * * * between a State and citizens of another State."

It was held that this grant of jurisdiction was not an exclusive grant. In the course of its opinion the court quoted from Hamilton in the Federalist as follows:

> The principles established in a former paper teach us that the State will retain all *preexisting* authorities, which may not be exclusively delegated to the Federal head; and that this exclusive delegation can only exist in one of three cases; where an exclusive authority is,

> in express terms, granted to the Union; or where a particular authority is granted to the Union, and the exercise of a like authority is prohibited to the States; or, where an authority is granted to the Union, with which a similar authority in the States would be utterly incompatible. Though these principles may not apply with the same force to the judiciary as to the legislative power, yet I am inclined to think that they are, in the main, just with respect to the former, as well as the latter. And under this impression I shall lay it down as a rule that the state courts will retain the jurisdiction they now have, unless it appears to be taken away in one of the enumerated modes.

Mr. Justice Harlan, writing the opinion of the court, concluded:

> If it was intended to withdraw from the States authority to determine, by its courts, all cases and controversies to which the judicial power of the United States was extended, and of which jurisdiction was not given to the national courts exclusively, such a purpose would have been manifested by clear language. Nothing more was done by the Constitution than to extend the judicial power of the United States to specified cases and controversies; leaving to Congress to determine whether the courts to be established by it from time to time should be given exclusive cognizance of such cases or controversies, or should only exercise jurisdiction concurrent with the courts of the several States.
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> * * * * *
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> That case [*Gittings* v. *Crawford*], it is true, did not present any question as to the jurisdiction of the state courts, but it affirms the rule that the grant of original jurisdiction to a particular court in enumerated cases does not, of itself, import that the jurisdiction of that court is exclusive in such cases.

The principle established by these cases is that a grant of jurisdiction to one court does not deprive another court of the jurisdiction it already had, unless an intention so to do be expressed by "clear language" or by necessary implication, or, as Hamilton expressed it, unless the retention of jurisdiction by the first tribunal be "utterly incompatible" with the grant to the second one.

Our jurisdiction to try such a case as this is clear; it was not expressly taken away by the Act of February 27,

1909, *supra*, nor is there anything in the Act from which such an intention can be implied. Certainly there is nothing incompatible in the exercise of jurisdiction by this court with the grant of jurisdiction to the courts of the Canal Zone.

The application of the principle of the cases above referred to by the courts to other Acts is not very helpful, and so we do not discuss *United States* v. *Pfitsch*, 256 U. S. 547, arising under the Lever Act; nor *Venezuelan Meat Export, Ltd.* v. *United States*, 58 C. Cls. 76; *Fleet Corp.* v. *Rosenberg Bros.*, 276 U. S. 202; *Johnson* v. *Fleet Corp.*, 280 U. S. 320; and *Matson Navigation Co.* v. *United States*, 284 U. S. 352, arising under the Admiralty Act; nor *McBean, Admr.*, v. *United States*, 80 C. Cls. 227, arising under the War Risk Insurance Act. Suffice it to say that in those cases an intention to confer exclusive jurisdiction was much plainer than in the case at bar.

We are of opinion that defendant's plea to the jurisdiction should be overruled. It is so ordered.

MADDEN, *Judge*, and LITTLETON, *Judge*, concur.

JONES, *Judge*, and WHALEY, *Chief Justice*, took no part in the decision of this case.

In this case (No. 45473) following the above decision, general traverse was filed by the defendant July 17, 1943.

CLIFFORD PORTER POWELL v. THE UNITED STATES

[No. 45257. Decided April 5, 1943]

On the Proofs

Pay and allowances; bachelor officer in U. S. Navy with dependent mother.—Following the decision in *Mumma* v. *United States*, 99 C. Cls. 261, it is *held* that plaintiff, bachelor officer in U. S. Navy, is entitled to recover the difference between the amount already paid him for rental and subsistence allowances as an officer without dependents for the entire period of his service and the amount which should have been paid to an officer with dependent mother.

Same.—Plaintiff's mother was dependent on him for her chief support.

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *King & King* were on the brief.

Mr. L. R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. December 12, 1931, plaintiff accepted an ad interim appointment as Assistant Surgeon, United States Navy, with rank as lieutenant, junior grade, from November 5, 1931. March 14, 1932, he was commissioned regular Assistant Surgeon, United States Navy, with rank of lieutenant, junior grade, from November 5, 1931. September 22, 1938, he was commissioned ad interim Passed Assistant Surgeon, with rank of lieutenant, from June 30, 1937. February 3, 1939, he was commissioned regular Passed Assistant Surgeon, with rank of lieutenant from June 30, 1937, and still holds that rank. Plaintiff is a bachelor officer.

2. Plaintiff's father is more than 67 years of age. He is in poor health, suffering from chronic bronchitis, bad kidneys, and arthritis. He was employed regularly as a salesman for nursery stock on a commission basis, selling fruit trees principally, until 1929 or 1930. While he still sells a small amount of nursery stock, he has not worked regularly since 1929 or 1930. His commissions for the last several years have not amounted to more than $50 or $100 a year, and do little more than pay the expenses he incurs in selling the nursery stock.

He has owned no real property or income-producing personal property since September 1, 1934, except a small farm of 47 acres which he purchased about 1936 for $490. He rented the farm at $40 a year, but had difficulty in collecting the rent. As the farm did not prove profitable he sold it in 1937 or 1938 for $500. He used the proceeds from its sale to pay the unpaid balance of the purchase price, taxes, and certain personal and business debts he had previously incurred.

3. Plaintiff's mother, Lenora Beatrice Powell, is more than 56 years of age. She is in poor health, suffering from kidney trouble, and has been on a strict diet for the last 10 years.

She, since September 1, 1934, has owned no real or income-producing personal property.

4. Plaintiff's parents live in a house owned by plaintiff in Auburn, Alabama. This house was originally owned by the parents, they having purchased it in 1926 for $3,500, paying $500 cash, the balance of the purchase price to be paid at the rate of $300 a year, plus interest at the rate of 8% on the unpaid balance. They were unable to meet the yearly payments on the house and in 1934 were three years behind in their payments. Plaintiff learned of their difficulty and agreed to, and did, take over the house, refinancing it through the Home Owners' Loan Corporation. At that time there was $1,815 owing on the house, plus an assessment of $386 for street paving.

The house when owned by plaintiff's parents contained seven rooms. It was old and in bad repair. Plaintiff after taking it over began to repair and remodel the house. This was done gradually over a considerable period of time at a cost of approximately $5,000 and was paid for by plaintiff out of his salary. The house as remodeled and enlarged by plaintiff contains more than 16 rooms. He completed paying for the house with the repairs and improvements in August 1941, and he estimates that he has spent a total of approximately $7,700 on the house since 1934. The taxes on the house have been paid by plaintiff.

5. Plaintiff's mother has since 1936 rented rooms in the house to college students and sometimes to Civil Service employees. The income realized from the source is extremely variable, but she estimates that she receives from $45 to $50 a month from that source during the winter months. During the summer she is generally unable to rent the rooms, although she sometimes rents a few.

6. The average monthly living expenses of plaintiff's parents amount to about $98 and consist of the following items: food, $45; laundry, $8; light, $4; about $8 for gas which is used for heating and cooking; water, $4.50 or $5; clothing, $10; medical attention for the mother, $10; servant, $8.

7. Plaintiff, besides furnishing his parents with the home in which they reside and rent rooms, has given them any

additional money they have needed to defray their living expenses. Most of these contributions have been made in cash. While he has kept no record of his contributions to them, plaintiff estimates that he has given them approximately $500 a year each year since 1934.

8. Plaintiff's parents have two daughters and three sons besides plaintiff. One son, Clyde, is 32 years of age, married and has one child. At the time the testimony in this case was taken he was serving on active duty as a Reserve Officer, United States Army. The second son, Wayne, is 28 years of age and unmarried. He has been unemployed much of the time since 1934 and earned no more than enough to pay his own living expenses. The third son, Roy, is 25 years of age, and he likewise was unemployed much of the time after 1934 and earned hardly enough to pay his own living expenses. July 11, 1941, he was inducted into the United States Army, and at the time testimony in this case was taken he held the grade of private, first class.

Both daughters are married and dependent upon their husbands for their own support.

None of the children other than plaintiff have assisted in the support of their parents since September 1, 1934, and the two sons, Roy and Wayne, have in fact received financial assistance from plaintiff from time to time. These two sons resided with their parents during part of the time but at such times they were unemployed and contributed nothing towards the payment of the household living expenses.

9. Plaintiff's mother was, during the period here in question, dependent upon plaintiff for her chief support.

10. During the period here involved, plaintiff occupied quarters at his duty stations as follows:

From September 1, 1934, to November 25, 1934, he was assigned to duty with the Civilian Conservation Corps and stationed at Dadeville, Alabama, where he occupied a tent as quarters.

From November 25, 1934, to February 1, 1935, he was assigned to duty with the Civilian Conservation Corps and stationed at Holly Springs, Mississippi, where, with the chaplain, he shared a single room in an old farmhouse.

From February 1935 to November 1935 he was assigned to

duty with the Civilian Conservation Corps and stationed at Camp Hill, Alabama, where he occupied an unceiled room in a temporary building, sharing a community bath with other officers.

From November 1935 to December 23, 1935, he was assigned to duty as District Inspector, Civilian Conservation Corps, and stationed at York, Alabama. He traveled around a large part of the time but when in camp he, with another officer, occupied a single room in a temporary building.

He was on leave from December 23, 1935, to January 30, 1936, during which time he occupied no quarters.

From January 30, 1936, to February 18, 1936, he was stationed at the United States Naval Hospital, Pensacola, Florida, and was not assigned quarters.

From February 18, 1936, to November 1, 1936, he was assigned to duty at the Naval Air Station, Pensacola, Florida, and was not assigned quarters.

From November 1, 1936, to December 3, 1936, he was on leave and was not assigned quarters.

From December 3, 1936, to March 5, 1937, he was on travel status under orders assigning him to duty in China.

From March 5, 1937, to May 23, 1938, he was assigned to duty aboard the U. S. S. *Monocacy*, where he occupied one room which was furnished for his sole use.

From May 23, 1938, to June 3, 1938, he was on travel status, journeying across China, and was not assigned quarters.

From June 3, 1938, to February 3, 1939, he was assigned to duty with the 4th Regiment, United States Marine Corps, and stationed at Shanghai, China. He was not assigned quarters.

From February 3, 1939, to May 3, 1939, he was on travel status returning from China.

From May 3, 1939, to May 24, 1939, he was stationed at the Navy Yard, Portsmouth, Virginia, and was not assigned quarters.

From May 24, 1939, to January 12, 1940, he was a patient at the Naval Hospital, Portsmouth, Virginia, for treatment for injuries received in an accident in the line of duty.

From January 12, 1940, to April 15, 1940, he was stationed

at the Navy Yard, Portsmouth, Virginia, and was not assigned quarters.

From April 15, 1940, to January 29, 1941, he was stationed at the Naval Hospital, Portsmouth, Virginia, and was not assigned quarters.

From January 29, 1941, to May 3, 1941, he was stationed at the Navy Yard, Portsmouth, Virginia, and was not assigned quarters.

From May 6, 1941, to January 2, 1942 (when plaintiff testified), he was assigned to duty with the Fleet Marine Force and stationed at New River, North Carolina, where he occupied as quarters a tent assigned to himself and another officer.

11. Plaintiff has been paid the rental allowance of an officer of his rank and length of service, without dependents, since September 1, 1934, except for the period from March 5, 1937, to May 23, 1938, during which he was assigned to duty aboard the U. S. S. *Monocacy*.

12. Plaintiff filed a claim for increased rental and subsistence allowances, on account of a dependent mother, in the General Accounting Office, where it was disallowed.

13. Plaintiff's claim is a continuing one.

The court decided that the plaintiff was entitled to recover, in an opinion *per curiam*, as follows:

Plaintiff, a commissioned officer in the United States Navy, sues to recover additional amounts which, he claims, he should have been paid as rental and subsistence allowances because his mother was dependent upon him for her chief support. Plaintiff's claim is based upon the Act of June 10, 1922 (42 Stat. 625), as amended by Section 2 of the Act of May 31, 1924 (43 Stat. 250), and the Pay Readjustment Act of June 16, 1942, Public Law 607, Chapter 413, 77th Congress, 2d Session, Sections 4 and 6. We have found that plaintiff's mother was dependent upon him, within the meaning of the applicable statutes, so his allowances should have been computed upon that basis. He was paid the allowances of an officer without dependents for all of the period of his service, except the period during which he was assigned to duty on board the U. S. S. *Monocacy*. The amounts so paid should be deducted from the amounts which plaintiff, as an

officer with dependents, should have been paid. No deduction should be made for the time during which plaintiff served on the *Monocacy*, as plaintiff should have been paid his full allowances for this period as well as for the period during which he had no public quarters. Nor should any deduction be made for any of the public quarters which he occupied at any time, as they were not adequate for an officer with a dependent mother. *Mumma* v. *United States*, 99 C. Cls. 261.

Plaintiff is entitled to recover the difference between the amount already paid him for rental and subsistence allowances and the amount which should have been paid to an officer with a dependent mother. Entry of judgment will be suspended pending the filing of a report from the General Accounting Office showing the amount due plaintiff at the date of this decision.

In accordance with the above opinion and upon report from the General Accounting Office showing the amount due thereunder to be $5,350.48, and upon plaintiff's motion for judgment, it was ordered January 3, 1944, that judgment for the plaintiff be entered in the sum of $5,350.48.

WILLIAM FREDERICK HOLMES, JR., v. THE UNITED STATES

[No. 45414. Decided April 5, 1943]

On the Proofs

Pay and allowances; increased allowance for dependent mother.—It is *held* that plaintiff, a bachelor officer in the U. S. Army, with dependent mother, is entitled to recover for increased rental and subsistence allowances for the period from October 1, 1940, to date of judgment.

Same; dependency.—In order to establish dependency of Army officer's mother it is not necessary that the mother should have exhausted the principal of her estate from which she receives a monthly income as interest smaller than the amounts contributed by her son; citing *Tammany* v. *United States*, 69 C. Cls. 687, 690; *Bradley* v. *United States*, 74 C. Cls. 521, 526; *Simons* v. *United States*, 92 C. Cls. 132, 135.

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *King & King* were on the brief.

Mr. Milton Kramer, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. E. Leo Backus* was on the brief.

The court made special findings of fact as follows:

1. Plaintiff, a bachelor officer in the United States Army, is suing under the Act of June 10, 1922 (42 Stat. 625), as amended by the Act of May 31, 1924 (43 Stat. 250), for increased rental and subsistence allowances on account of a dependent mother for the period from October 1, 1940, to date of judgment.

He was appointed First Lieutenant, Medical Reserve, United States Army, June 6, 1930. He was promoted to Captain, Medical Reserve, May 20, 1935, which appointment he accepted June 1, 1935. December 10, 1936, he accepted appointment as First Lieutenant, Medical Corps, Regular Army, to rank from December 7, 1936, and on June 17, 1938, he was promoted to the rank of Captain, which rank he now holds. He served on active duty from July 13, 1932, to July 26, 1932; from June 16, 1935, to June 29, 1935, and his active commissioned service has been continuous since July 15, 1935.

2. Plaintiff's mother, Mrs. Theresa Holmes, is more than 62 years of age, is partially blind, very nervous, and suffers from arthritis. She has had one eye operation and is saving money for a second operation, which will probably cost $500. She has not been gainfully employed since October 1, 1940, and cannot hold such employment because of her age and the condition of her health.

Her husband, plaintiff's father, died May 3, 1938, leaving her an unimproved lot in San Antonio, Texas, acquired by him in 1927 for approximately $3,000, which at the time of his death was mortgaged for $813.75. He also left her sev- with the Union Central Life Insurance Company at 3½ eral life insurance policies, from which she realized the following: $4,428.75 in cash; $4,250.32, which she left on deposit

percent interest (approximately $12 per month), and $4,719.04, payable by the New York Life Insurance Company in 240 monthly installments of $26.

Shortly after his father's death plaintiff conveyed to his mother, without consideration, the house in which his parents had lived, on which there was a mortgage of about $1,500. He acquired this property from his father in 1931 for approximately $3,000.

3. Out of the insurance proceeds plaintiff's mother paid both the mortgage of $813.75 on the unimproved lot and that of $1,500 on the family home, and defrayed her husband's funeral expenses of $700. She sold the family home in March 1940 for $3,800, receiving $600 in cash and a note payable, both interest and principal, in monthly installments of $25.

4. In November 1941, when testimony was taken in this case, she owned the vacant lot in San Antonio, Texas, which she had attempted, without success, to sell for $1,600. She had $200 on deposit in a savings account, $380 in another bank account, and $160 in the form of a traveler's check, which sums remained from the cash proceeds of the insurance policies. In addition she had a monthly income of $63, as follows: $26 from the New York Life Insurance Company; $12 interest on the fund deposited with Union Central Life Insurance Company, and $25 paid on the balance of the purchase price of the family home.

5. Plaintiff and his mother have lived in an apartment in Washington, D. C., since October 1, 1940. Their joint monthly household expenses are all paid by plaintiff and consist of the following: Rent $70, maid service $35, food $60, cleaning and laundry $15, electricity $2, and telephone $5, a total of $187. Half of this amount, or about $93, is attributable to the mother. In addition, plaintiff's mother has personal expenses amounting to about $57 per month, which she pays out of her own income and which are made up of the following items: Clothes $20, church $6, recreation $10, incidentals $10, traveling expenses $5, and lecture course $6. The lectures are intended to benefit her nervous condition.

6. Plaintiff has occupied no Government quarters since

October 1, 1940, and has been on a rental-allowance status since that date. He is entitled to increased rental and subsistence allowances on account of a dependent mother in the sum of $153.80, representing the difference between the rental and subsistence allowances paid him as an officer without dependents and the rental and subsistence allowances of an officer of his rank and length of service with a dependent, for the period from October 1, 1940, to January 31, 1941, the date of the latest available pay roll on file in the office of the Comptroller General. This is a continuing claim.

The court decided that the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of this court:

Plaintiff sues to recover additional rental and subsistence allowance on account of an alleged dependent mother.

Plaintiff, a bachelor, and his mother jointly occupied an apartment in Washington, D. C. He paid all the household expenses amounting to $187.00. It is fair to attribute one-half of these expenses to each of them. In addition, his mother had personal expenses amounting to about $57.00 per month which she paid. She had an income of $38.00 per month, plus such part of monthly installments of $25.00 per month payable on the sale price of her home as represented interest. She had $740.00 in bank and in traveler's checks and had on deposit in one insurance company $4,250.32 drawing interest at 3½ percent, and in another $4,719.04, payable $26 per month. All this was realized from life insurance policies on the life of her deceased husband.

Since plaintiff's mother had an income of no more than $40.00 or $45.00 per month, and her expenses were about $150.00, and since plaintiff paid $93.50 thereof, it is plain he was her chief support and is entitled to the additional allowance claimed. It was not necessary that his mother should exhaust her principal before plaintiff could claim dependency. *Tammany* v. *United States*, 69 C. Cls. 687, 690; *Bradley* v. *United States*, 74 C. Cls. 521, 526; *Simons* v. *United States* 92 C. Cls. 132, 135.

The plaintiff is entitled to recover, but the case is a continuing one and judgment will be suspended awaiting a report from the General Accounting Office showing the amount due plaintiff in accordance with the findings of fact and this opinion, at which time judgment will be entered. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge; and* WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

In accordance with the above opinion and upon report from the General Accounting Office showing the amount due thereunder to be $1,523.00, and upon plaintiff's motion for judgment, it was ordered December 6, 1943, that judgment for the plaintiff be entered in the sum of $1,523.00.

THADDEUS A. HERRICK, JR. v. THE UNITED STATES

[No. 45616. Decided April 5, 1943]

On the proofs

Pay and allowances; bachelor officer in U. S. Navy with dependent mother.—It is *held* that plaintiff, bachelor officer in U. S. Navy, is entitled to recover increased rental and subsistence allowances of an officer of his rank, where it is shown conclusively that plaintiff's mother was in fact dependent upon him for her chief support.

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *King & King* was on the brief.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff, Thaddeus A. Herrick, Jr., enlisted in the United States Navy on July 18, 1934, and thereafter served as an enlisted man until July 6, 1936, when he was discharged

to enter the United States Naval Academy as a midshipman; he was appointed a midshipman on July 7, 1936, and, after graduating from the United States Naval Academy, was appointed as ensign with rank from June 6, 1940. He has served continuously as a commissioned officer on active duty since that date. He is a bachelor officer.

2. Plaintiff's mother, Gladys E. Herrick, is 51 years of age. In June 1936, she obtained a divorce from her husband. She was awarded alimony of $15 a month, which her former husband paid until about December 1936, since which time he has paid nothing. She has taken no legal action to enforce her award of alimony, but has frequently requested him to send her the alimony, but he refuses to do so, telling her that his business is very poor and he cannot afford to pay her the alimony. He has since remarried.

3. From June 6, 1940, to December 1940, plaintiff's mother lived with her daughter in a house in Wilmington, California. They paid $25 a month for rent for the house, $40 for food, $6 for gas and electricity, $10 for laundry and miscellaneous household expenses, or a total of $81 a month for their joint household expenses, half of which was attributable to the mother alone. The mother's medical and dental expenses amounted to about $6 a month, and she spent about $12.50 a month for clothing, etc. Any other miscellaneous expenses she may have incurred were paid for out of the balance remaining from her income of $75 a month.

4. From December 1940 to about May 1941, plaintiff's mother lived with her daughter in Long Beach, California. Their joint household expenses were about the same as they had been at Wilmington, California, although their rent was $32.50 a month instead of the $25 they had previously paid. The mother's incidental expenses likewise were about the same as they had been in Wilmington, California.

5. About June 1941, plaintiff's mother and her daughter moved to San Pedro, California, where they were living when the mother testified in connection with this case. Their joint household expenses were increased by $3.50 for a

telephone, otherwise their joint household and the mother's incidental expenses remained about the same as they had been in Long Beach, California.

6. Plaintiff's mother has two children, the plaintiff and the daughter with whom she has resided since 1940. The daughter is 23 years of age, and was married until August 1941, when she divorced her husband. She has been employed since June 1940 earning from $80 to $120 a month. Since June 6, 1940, she has paid her own living expenses out of her earnings, but has contributed nothing towards the support of her mother.

7. Plaintiff gave his mother $230 during June and July 1940, and since August 1940 has allotted $75 a month to her from his pay. His mother has not been gainfully employed at any time and possesses no training or skill which would enable her to obtain or hold employment. She owns no real property or income-producing personal property, and her only source of income, since June 1940, has been the plaintiff's contributions to her.

8. Plaintiff made claim for increased rental and subsistence allowances on account of a dependent mother, which claim was disallowed by the General Accounting Office.

9. The difference between the rental and the subsistence allowances of an officer of plaintiff's rank and length of service with a dependent, and the rental and subsistence allowances paid to him as an officer without dependents, during the period from June 6, 1940, to December 31, 1941, as computed by the General Accounting Office, is $604. Plaintiff's claim, however, is a continuing one.

The court decided, in an opinion *per curiam*, as follows, that the plaintiff was entitled to recover:

The facts in this case are not in dispute. They show conclusively that plaintiff's mother was in fact dependent upon him for her chief support. Plaintiff is entitled to recover, the amount of judgment to be suspended pending the filing of a report from the General Accounting Office showing the amount due under the foregoing findings and in accordance with this opinion.

In accordance with the above opinion and upon report from the General Accounting Office showing the amount due thereunder to be $1,458.80, and upon plaintiff's motion for judgment, it was ordered December 6, 1943, that **judgment** for the plaintiff be entered in the sum of $1,458.80.

THE NEW YORK TRUST COMPANY AND PERCY H. JENNINGS, EXECUTORS OF THE ESTATE OF LAURA H. JENNINGS v. THE UNITED STATES

[No. 45691. Decided October 4, 1943]

On the Proofs

Estate tax; irrevocable trust, income retained by settlor during lifetime, created prior to March 3, 1931.—No part of the value of an irrevocable trust fund created prior to the approval of the Joint Resolution of March 3, 1931, amending Section 302 (c) of the Revenue Act of 1926, is subject to an estate tax because of the retention by the settlor of the income therefrom for his lifetime. *Hassett* v. *Welch, et al.*, and *Helvering* v. *Marshall, Administrator*, 303 U. S. 303, 307, cited. *Helvering* v. *Hallock et al., Trustees*, 309 U. S. 106, distinguished.

Same; Joint Resolution of March 3, 1931, not retroactive.—The Joint Resolution of March 3, 1931, amending Section 302 (c) of the Revenue Act of 1926, was not retroactive and did not apply to property transferred by an irrevocable trust created prior to date of approval of the Joint Resolution. (46 Stat. 1516.)

Same; corpus of trust created prior to approval of Joint Resolution of March 3, 1931, not includable in gross estate where income is retained by settlor.—Where on February 13, 1924, decedent executed an irrevocable trust instrument under the terms of which the income from the trust fund was to be paid to settlor for her lifetime, and at her death the corpus of the trust was to be divided into shares, the income to be paid to her three children, if then living, and the principal to go ultimately to persons appointed by them or their children or heirs; it is *held* that the retention by the settlor-decedent during her lifetime of the income from the 1924 trust did not require the value of the corpus of the trust fund to be included in decedent's gross estate upon her death on July 8, 1939, for the purpose of determining the value of the net estate subject to tax as a "transfer to take effect in possession or enjoyment at or after death" under Section 811 (c), Internal Revenue Code, and plaintiffs, executors, are entitled to recover.

The Reporter's statement of the case:

Mr. Charles C. Parlin for plaintiffs. *Mr. John A. Reed* and *Wright, Gordon, Zachry, Parlin & Cahill* were on the brief.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for defendant. *Mr. Robert N. Anderson* and *Mr. Fred K. Dyar* were on the brief.

Plaintiffs seek to recover $399,281.49, alleged overpayment of estate tax and interest thereon collected February 12, 1942, together with interest from date of payment, on the ground that no part of the value of a trust fund under an irrevocable trust created in February 1924 was includable in the gross estate of decedent under section 811 (c) of the Internal Revenue Code upon decedent's death July 8, 1939.

The court having made the foregoing introductory statement, entered special findings of fact as follows:

1. Laura H. Jennings died July 8, 1939, a citizen and resident of Oyster Bay, New York.

2. July 27, 1939, her last will and testament was duly admitted to probate by the Surrogate's Court of the State of New York, Nassau County, and letters testamentary thereon were issued to The New York Trust Company and Percy H. Jennings, both of whom are now acting as executors of the estate.

3. October 8, 1940, the executors filed a federal estate-tax return for the estate of Laura H. Jennings reporting a net estate of $2,338,702.89 on which a tax of $557,210.87 was shown to be payable, which amount was computed by deduction of the full eighty percent credit for state inheritance taxes allowed by section 813 (b) of the Internal Revenue Code.

4. The executors paid $557,210.87 to the collector of internal revenue on October 8, 1940, on account of tax due on the return as filed.

5. Upon audit of the return the Commissioner of Internal Revenue asserted a net deficiency in estate tax, after provisional allowance of the full 80% credit for state inheritance

taxes provided for by section 813 (b) of the Internal Revenue Code, of $357,048.62, and in due course payment of this amount, together with interest thereon, was demanded by the collector.

6. In computing the deficiency the Commissioner included as part of the gross estate of decedent the amount of $1,132,-334.16, representing the value of the trust fund created by a certain agreement and deed of trust between Laura H. Jennings, as grantor, and Percy H. Jennings and George S. Franklin, as trustees, dated as of February 13, 1924, this amount having been included by the Commissioner as part of the gross estate as a transfer intended to take effect in possession or enjoyment at or after death because under the terms of the agreement and deed of trust Laura H. Jennings, the grantor, had reserved to herself the right to the income of the trust fund during her lifetime. The Commissioner made no claim that transfer was made in contemplation of death. A true copy of the aforementioned agreement and deed of trust is attached to the petition herein as exhibit B. There has been no addition to the trust fund since its original establishment in 1924.

7. February 12, 1942, the executors paid the collector the amount of the net deficiency of $357,048.62, together with interest thereon of $28,857.35, making a total of $385,905.97.

8. March 9, 1942, the executors filed with the collector a claim for refund of $399,281.49 based on the ground that no part of the value of the aforementioned trust fund was includable in the gross estate of decedent under the Internal Revenue Code. A true copy of such claim for refund is attached to the petition herein as exhibit C.

9. Notice of disallowance of the claim for refund was given by letter from the Commissioner May 18, 1942. A true copy of this letter is attached to the petition herein as exhibit D.

No part of the amount of $399,281.49 claimed in the petition has been refunded.

10. Laura H. Jennings was born September 8, 1858. The names and ages (taken from the nearest birthday) of all the children, grandchildren, great-grandchildren and other

issue of Laura H. Jennings living on February 13, 1924, and July 8, 1939 (there being then living no legally adopted children of Frederic B. Jennings, Jr.), were as follows:

Name and Relationship to Laura H. Jennings:	February 13, 1924 Age.	July 8, 1939 Age.
Frederic B. Jennings, Jr. (son of Laura H. Jennings)	33	
Edward P. Jennings (son of Laura H. Jennings)	29	44
Percy H. Jennings (son of Laura H. Jennings)	43	58
Elizabeth J. Franklin (daughter of Laura H. Jennings)	37	52
Percy H. Jennings, Jr. (child of Percy H. Jennings and grandchild of Laura H. Jennings)	16	32
Joanna Russell Jennings (Hadden) (child of Percy H. Jennings and grandchild of Laura H. Jennings)	15	31
Elizabeth A. Jennings (Truslow) (child of Percy H. Jennings and grandchild of Laura H. Jennings)	11	27
Frederic B. Jennings, 2nd (child of Percy H. Jennings and grandchild of Laura H. Jennings)	8	23
Laura H. Jennings, 2nd (child of Percy H. Jennings and grandchild of Laura H. Jennings)	6	21
George S. Franklin, Jr. (child of Elizabeth J. Franklin and grandchild of Laura H. Jennings)	11	26
Lila H. Franklin (child of Elizabeth J. Franklin and grandchild of Laura H. Jennings)	9	24

11. Frederic B. Jennings, Jr., died March 29, 1932, without issue. Upon the death of Laura H. Jennings that part of the trust corpus which Frederic B. Jennings, Jr., would have received, had he then been living, passed to Percy H. Jennings and Elizabeth J. Franklin, children of Laura H. Jennings, the beneficiaries in default of appointment.

The court decided that plaintiffs, executors, are entitled to recover, entry of judgment to be suspended until the filing by the parties of a stipulation showing the amount of the

overpayment to be refunded, after allowance of the eighty (80) percent credit for New York estate and inheritance taxes provided for by section 813 (b) of the Internal Revenue Code.

LITTLETON, *Judge*, delivered the opinion of the court:

Laura H. Jennings died July 8, 1939. February 13, 1924, she executed an irrevocable trust instrument under the terms of which the income from the trust was to be paid to her for life. At her death the principal or corpus of the trust was to be divided into shares, the income paid to her three children if then living and the principal to go ultimately to persons appointed by them or their children or their heirs.

The Commissioner of Internal Revenue held that the value of the trust property so transferred in this irrevocable trust of 1924 was includable in the decedent's gross estate for the purpose of determining the value of the net estate subject to tax as a "transfer to take effect in possession or enjoyment at or after death," under section 811 (c), Internal Revenue Code.

The sole question presented here is whether the retention by the settlor-decedent during her life of the income of the 1924 trust requires the value of the corpus of the trust fund to be included in the gross estate upon her death July 8, 1939, as an interest intended to take effect in possession or enjoyment at or after death within the meaning of the applicable provisions of the estate-tax provisions of the pertinent taxing acts.

At the time the decedent created the trust in question on February 13, 1924, the Revenue Act of 1921 [1] was in effect and section 402 (c) thereof provided "That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—to the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth." This provision was reenacted in section 302 (c) of the Revenue Act

[1] 42 Stat. 227, 278.

of 1924 [2] and in section 302 (c) of the Revenue Act of 1926.[3] No change was made in the language of the Revenue Act of 1926 until the approval of the Joint Resolution of Congress on March 3, 1931. By that Joint Resolution subsection (c) was amended to read as follows (the italicized portion being the amendment added by the Joint Resolution):

> To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom;* * * *.

Prior to approval of Joint Resolution 529, of March 3, 1931, 46 Stat. 1516, no part of the value of trust property, or fund, under an irrevocable trust instrument, such as is involved in this case, was includable in the gross estate of the decedent as a gift or transfer to take effect in possession or enjoyment at or after death because the decedent retained the income of the trust during his lifetime. *May, et al., Executors* v. *Heiner*, 281 U. S. 238, 239; *Burnet* v. *Northern Trust Co.*, 283 U. S. 782; *Morsman, Administrator*, v. *Burnet*, 283 U. S. 783; *McCormick* v. *Burnet*, 283 U. S. 784.

In *May* v. *Heiner*, *supra*, decided April 14, 1930, the income of the trust fund was payable to the husband of the settlor-decedent for his life and after his death the income was payable to the decedent during her lifetime with remainder over to her children. The court held that this was not a gift intended to take effect in possession or enjoyment at or after death. In *Burnet* v. *Northern Trust Co.*, *supra*, and in the other two cases cited, which were decided at the same time on March 2, 1931, the court held that where under a trust instrument the income was payable to the settlor during his lifetime and upon his death the trust was to terminate and the property was to be distributed among his children, no

[2] 43 Stat. 253, 304.
[3] 44 Stat. 9, 70.

part of the trust fund was includable in the gross estate of decedent as a gift intended to take effect in possession or enjoyment at or after death.

The Joint Resolution of March 3, 1931, amending section 302 (c) of the Revenue Act of 1926, was passed as a result of decisions of the Supreme Court in the *Northern Trust Company*, *Morsman*, and *McCormick* cases above cited on March 2. The Joint Resolution of March 3, 1931, was not retroactive and did not apply to property transferred by an irrevocable trust created prior to date of its approval. *Hassett* v. *Welch*, *et al.*, and *Helvering* v. *Marshall*, *Administrator*, 303 U. S. 303, 307. The Hassett and Marshall cases were decided in 1938 and held that no part of the value of a trust fund created prior to March 3, 1931, is subject to an estate tax because of the retention by the settlor of the income therefrom for his life.

Defendant argues that the decisions in *May* v. *Heiner*, *supra*, and *Burnet* v. *Northern Trust Co.*, *supra*, were overruled in *Helvering* v. *Hallock*, *et al.*, *Trustees*, 309 U. S. 106. We do not agree with this contention. The *Hallock case* dealt only with the effect, for tax purposes, of the reservation by the settlor of a reversionary interest in the corpus of the trust property which it was held was a sufficient beneficial interest in the trust property to justify the inclusion of the value of the trust property in the gross estate as an interest which ceased by reason of death, the court saying, at p. 112, in commenting upon *Klein* v. *United States*, 283 U. S. 231, "By bringing into the gross estate at his death that which the settlor gave contingently upon it, this Court fastened on the vital factor."

In the *Hallock case* the court decided only that the retention of a possibility of reversion of the trust property to the settlor required the inclusion of the value of the trust property in the gross estate, and made no reference to the effect of retention for life of the income of an irrevocable trust, a far different question which had been settled in prior decisions to which no reference was made. We cannot hold that the opinions in *May* v. *Heiner*, *Burnet* v. *Northern Trust Co.*, and *Hassett* v. *Welch*, *supra*, were overruled by inference by the opinion in *Helvering* v. *Hallock*, *supra*.

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In filing the federal estate-tax return on which a tax of $557,210.87 was computed and paid, the executors computed such tax by deducting the full 80 per cent credit for New York estate and inheritance taxes allowed by section 813 (b) of the Internal Revenue Code (finding 3). Upon audit of the return the defendant asserted a net deficiency in Federal estate tax after making a provisional allowance of $357,048.62 on account of an allowable 80 per cent credit for state estate and inheritance taxes provided by section 813 (b), *supra.* It is not possible at this time to determine the exact amount of overpayment of federal estate tax made by plaintiffs for the reason that the exact amount of the New York estate and inheritance tax liability cannot be ascertained until the issue in this case as to whether the trust property is or is not taxable is determined. The New York State tax officials have been unwilling to determine the amount of the estate-tax liability until the issue presented in this case is determined.

Judgment in favor of plaintiffs for the exact amount of overpayment of the federal estate tax made as a result of the erroneous inclusion in the gross estate of the value of the trust fund at the date of decedent's death, after allowance of the full 80 percent for New York estate and inheritance taxes, as provided for by section 813 (b) of the Internal Revenue Code, will be entered upon the filing by the parties of a stipulation as to the amount of the credit for New York taxes and of the correct amount of refund of federal estate tax due. If the parties are unable to stipulate the correct amount of overpayment to be included in the judgment, the case will be referred to a commissioner of the court for the taking of proof and the making of a report to the court in the premises. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

In the above case, a stipulation was filed October 30, 1943, by the parties in which it was stated, besides other things:

(1) That the amount of estate and inheritance taxes paid by the decedent's estate to the State of New York is at least $125,529.43;

(2) That the amount of refund due plaintiffs, pursuant to the opinion of the Court, is $399,281.49 for which amount judgment should be entered; and

(3) That judgment should include statutory interest on the aforesaid sum of $399.281.49 as follows:

On $385,905.97 from February 12, 1942.

On $13,375.52 from October 8, 1940.

Whereupon, upon plaintiff's motion for judgment, and in accordance with said stipulation, it was ordered December 6, 1943, that judgment for the plaintiffs be entered in said sum of $399,281.49, with interest as provided by law on $385,905.97, part thereof, from February 12, 1942, and on $13,375.52, the balance thereof, from October 8, 1940.

JOSEPH R. GREGORY v. THE UNITED STATES

[No. 45776. Decided June 7, 1943]

On Demurrer

Contract for carrying mail; no extra compensation for increase in mail.—Contractor who, for a stated sum, agreed for a definite period to carry the mail "whatever may be its size, weight or increase" during the term of the contract, is not entitled to recover extra compensation on account of increased mail.

Same.—Under the terms of the contract plaintiff agreed to carry all the mail during its term without extra compensation, and under the provisions of the contract no extra compensation was to be paid.

Mr. George P. Nosacka for the plaintiff.

Mr. Percy M. Cox, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The facts sufficiently appear from the opinion of the court.

WHALEY, *Chief Justice*, delivered the opinion of the court:

This case comes to the court on a demurrer to the petition. Stripped of its surplus verbiage and pleonastic

phraseology the petition alleges that plaintiff entered into a contract for the performance of carrying the mail on Route No. 449,001 at New Orleans, Louisiana, for the period July 1, 1938, to June 30, 1942. Attached to the petition is a blank form of contract, not filled in as to dates or amounts, but which is referred to by the plaintiff as "Exhibit A" to show the nature of the contract entered into. As plaintiff has used this form as his exhibit of the terms of the contract under which he was performing service, we will assume that this is the contract under which he operated.

It is alleged that the plaintiff was to carry the mail under certain prescribed conditions as to the nature of the vehicles to be used; to furnish the necessary vehicles and keep them in proper condition; to take the mails from and deliver them to the Post Office at New Orleans; that he was to furnish the necessary number of vehicles to perform these services; and it is further alleged that the plaintiff, by reason of the fact that in 1941 military maneuvers were carried on in Louisiana for three months, was called upon to handle a great deal of mail in addition to the amount ordinarily to be handled under his contract agreement; that plaintiff was also required during the months of April, May, and June 1942, to handle increased amounts of mail; that by reason of this increased mail he was required to employ additional help, pay additional salaries; and that he had to expend several hundred dollars for extra wear and tear on his vehicles and for repairs, gasoline, and lubricating oil. In all, plaintiff claims that the extra expense to which he was put by reason of the increased mail, due to the maneuvers in and around his route, was over and above that which he would ordinarily have had under his contract to the extent of $3,896.26.

The defendant has demurred to this petition on the ground that it does not state a cause of action. From an examination of the copy of the contract attached to the petition it appears that plaintiff agreed to carry all the mails in the city of New Orleans for the period from July 1, 1938, to June 30, 1942, for a fixed sum. The terms of the contract make no provision for additional compensation for an increase of mail during the contract period but it

specifically provides, on the contrary, that no additional compensation is to be paid.

Under the terms of the contract it is provided that plaintiff is

> *First.* To carry said mail with celerity, certainty, and security, using therefor substantial regulation panel or screenbody motor vehicles, * * * in sufficient number and of sufficient capacity to transport the whole of said mail, whatever may be its size, weight, or increase during the term of this contract; * * *.

Paragraph three of the contract required plaintiff to furnish the necessary number of trucks which in the opinion of the postmaster "will be sufficient for the prompt and proper performance of the service including extra trucks to take the place of those that may be temporarily unserviceable, delayed waiting for trains, withdrawn from service for repairs, or required for special or advanced trips."

The tenth paragraph of the contract provides that the plaintiff shall perform "without additional compensation, any and all additional service that the Postmaster General may order during the contract term."

There is only one provision for extra compensation in the contract and that is in the event the site of the Post Office has been changed, and by reason of the change the distance to carry mail has increased more than a quarter of mile, but should the distance be less than one-quarter of a mile no extra compensation is to be received.

There is no allegation in the petition indicating that the distance the mail had to be carried was ever increased or that the site of the Post Office was changed.

Plaintiff made a claim to the Post Office Department for extra compensation on account of the increased mail. This claim was denied.

Under the terms of the contract plaintiff agreed to carry all the mail during its term without extra compensation, and, under the provisions of the contract, no extra compensation was to be paid.

This may appear to be a hard contract under the emergency situation, which may have arisen due to the increased

mail caused by the influx of soldiers in the territory, nevertheless, under the terms of the contract, there is no provision for payment.

We are of the opinion that the petition does not state a cause of action and the demurrer is sustained. The petition is dismissed.

It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

JONES, *Judge*, took no part in the decision of this case.

Plaintiff's motion for leave to file an amended petition having been allowed, and such amended petition having been filed and the case having been submitted on defendant's demurrer to said amended petition, decision was rendered on December 6, 1943, in an opinion *per curiam*, as follows:

This case comes to the court for a second time. The defendant interposed a demurrer to the original petition and the court sustained the demurrer for the reason that, admitting all the allegatins as true, it appeared that no violation of the contract, on which plaintiff sued, had been made by the defendant.

Plaintiff has filed an amended petition and the defendant has again filed a demurrer.

The amended petition adds no new matter and simply sets up the same contract. The suggestion is made that because the court used the expression in its opinion that under the extraordinary circumstances the contract "may appear to be a hard contract," the court should make a liberal interpretation of the contract's terms and conditions instead of a construction according to its actual plain terms and conditions.

Courts are required to construe contracts legally and in accordance with their plain meaning and not according to what the Judges think should have been incorporated in the contracts.

The parties to the contract agreed to its terms and conditions. The judicial branch of the Government cannot read

into a contract terms which may morally be justified when the conditions have changed from those which existed when the contract was executed. Congress alone can grant relief under such circumstances.

The amended petition fails to state a cause of action. The demurrer is sustained. The petition is dismissed.

It is so ordered.

JOSEPH IRVING McMULLEN v. THE UNITED STATES

[No. 45242. Decided December 6, 1943]*

On the Proofs

Conviction of Army officer operates as immediate and permanent removal from office, under Section 203, Title 18, U. S. Code.—Conviction of Army officer of violation of section 203, Title 18, United States Code, operated to remove him immediately and permanently from his office, although the judgment of conviction was appealed from, and on that appeal, reversed.

Same; statute applicable to retired Army officer.—The statutory penalty of removal from office for violation of section 203, Title 18, U. S. Code, is applicable to an Army officer on the retired list as well as to an officer on active duty.

Retirement privilege; period of retirement not included.—The years during which an Army officer was on the retired list may not be included to make up the required 40 years for retirement within the meaning of the Act of June 30, 1882 (U. S. Code, Title 10, section 942).

Same; status of retired officer.—While a retired officer or soldier is, for some purposes, in the military service (*United States* v. *Tyler*, 105 U. S. 244; 16 C. Cls. 223, affirmed), he is not in the service within the meaning of section 942, Title 10, United States Code.

Army officer separated by appointment and confirmation of successor.—Appointment by the President, and confirmation by the Senate, of a successor to an Army officer who had been separated from the service by conviction of violation of section 203, Title 18, U. S. Code, operated as an effective removal from office, although the judgment of conviction was later reversed.

Same; "tenure of office" statutes.—The Supreme Court has repeatedly held that the "tenure of office" statutes, enacted by Congress during its controversy with President Johnson about Reconstruction policy, do not prevent the removal of an officer by the joint action

*Plaintiff's petition for writ of certiorari denied March 27, 1944.

of the President in appointing his successor and the Senate in ratifying the appointment. See *Blake* v. *United States*, 14 C. Cls. 462; affirmed 103 U. S. 227; and *Wallace* v. *United States*, 55 C. Cls. 396; affirmed 257 U. S. 541.

The Reporter's statement of the case:

Mr. Leo R. Friedman for the plaintiff. *Messrs. William E. Leahy* and *Nicholas J. Chase* were on the briefs.

Mr. Grover C. Sherrod, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Louis R. Mehlinger* was on the brief.

The court made special findings of fact as follows:

1. Plaintiff's service record in the Army of the United States is as follows:

April 11, 1896, to May 3, 1901, plaintiff served as a private, corporal, sergeant, and first sergeant of Troop H, 6th Cavalry. He was commissioned a second lieutenant of infantry to rank from February 2, 1901, the commission having been accepted May 4, 1901, and was transferred to cavalry May 22, 1901, to rank from February 21, 1901. He was retired on account of physical disability in line of duty September 20, 1906, and was recalled and served as a second lieutenant, U. S. Army, retired, on active duty March 28, 1916, to July 19, 1916.

June 3, 1916, under provisions of the Act of March 4, 1915, (38 Stat. 1062, 1068) plaintiff was restored to active duty as a first lieutenant of cavalry to rank from September 21, 1908 commission accepted July 20, 1916, and on August 17, 1916, he was promoted to captain to rank from July 1, 1916.

August 5, 1917, plaintiff was appointed a major of infantry, National Army, accepted August 23, 1917, and on September 30, 1919, he was honorably discharged as major of infantry, National Army, reverting to rank of captain, Regular Army. He was promoted to major in the Regular Army July 1, 1920, and was transferred to the Judge Advocate General's department August 18, 1921. He was promoted to lieutenant colonel June 17, 1921, and to colonel November 1, 1932, and was stationed at Washington, D. C., in the office of the Judge Advocate General.

2. Plaintiff has been admitted to the bar in Idaho, California, the Court of Claims, and the Supreme Court of the United States.

3. May 14, 1934, a Board of Medical Officers duly convened at Walter Reed General Hospital, Army Medical Center, examined plaintiff, and on the 15th of May 1934 found that he was permanently incapacitated for active military service and recommended that he be brought before a retiring board for its action.

By special orders No. 117, dated May 17, 1934, an Army Retiring Board was appointed pursuant to law to meet at Washington, D. C., for the purpose of examination of officers. By direction of the President of the United States of May 24, 1934, plaintiff was notified to appear before the Retiring Board and June 1, 1934, the Board maturely considered the case and found plaintiff incapacitated for active service, that the incapacity was permanent and was an incident of the service, and announced its finding to plaintiff.

June 7, 1934, the Surgeon General of the United States addressed a memorandum to the Adjutant General of the United States, concurring in the findings of the Retiring Board, and recommended that plaintiff be retired.

4. Plaintiff on May 24, 1934, received a letter from the Adjutant General of the Army advising him what steps he might take since the Army Retiring Board had found him physically incapacitated for active service, to which letter plaintiff replied under date of June 4, 1934, that he had been requested by the Chief of Staff, General MacArthur, to continue on active duty until the first part of August, after which time plaintiff would be granted leave with a view to his retirement on August 31, 1934.

5. On July 19, 1934, plaintiff addressed the following communication to the Adjutant General concerning his proposed retirement:

> 1. Referring further to letter dated May 24th, 1934 (A. G. 201, McMullen, Joseph I. (5–16–34) Off.), and my reply dated June 4, 1934, I requested that I be ordered home to await retirement on August 1st, 1934, instead of being granted leave of absence.

The following communication dated July 19, 1934, was addressed to plaintiff:

Colonel JOSEPH I. MCMULLEN,
Judge Advocate General's Department, Walter Reed General Hospital, Army Medical Center, Washington, D. C.

1. On June 29, 1934, the Honorable William N. Rogers, Chairman of Subcommittee 3 of the Committee on Military Affairs, wrote the Secretary of War in part as follows:

"In going over the records of the proceedings before subcommittee 3 of the Committee on Military Affairs, of which I am Chairman, I find that on the 19th day of this month a motion was adopted instructing me to 'write the Secretary of War requesting that no action be taken toward placing Colonel Joseph I. McMullen on the retired list until this Committee concludes its investigations.'"

2. In view of the above no action will be taken at this time to change the status of Colonel McMullen by placing him on the retired list until released by the Committee. Your request to be ordered home to await retirement will receive further consideration at the appropriate time.

By order of the Secretary of War:

FRANK C. BURNETT,
Adjutant General.

6. Sections 933 and 965, Title 10, U. S. C., show the procedure to be followed in the retirement of an officer such as plaintiff by reason of physical disability.

7. The report and recommendations of the Army Retiring Board, shown in finding 3, were filed in the War Department and were not laid before the President for his approval or disapproval.

8. June 6, 1935, an indictment was returned in open court in the then Supreme Court of the District of Columbia against plaintiff, Joseph I. McMullen, charging him with unlawfully, feloniously, knowingly, and willfully receiving compensation in the sum of $1,500 on July 6, 1932, while a colonel in the United States Army and in the employ of the Government of the United States, for services rendered to the Cuban-American Manganese Corporation in relation to certain proposed legislation in which said corporation was

interested. The alleged offense was in violation of Section 203, Title 18, United States Code.

Plaintiff was duly tried upon this indictment and convicted April 30, 1936. A motion for a new trial was overruled and plaintiff was, on May 8, 1936, sentenced to Washington Asylum and Jail for a period of six months and ordered to pay a fine of $1,000. Plaintiff perfected an appeal to the United States Court of Appeals for the District of Columbia. That court, on May 21, 1938, reversed the judgment and remanded the case for a new trial. June 30, 1939, a *nolle prosequi* was entered in plaintiff's case in the District Court of the United States for the District of Columbia.

9. On or about February 20, 1936, plaintiff was tried by a general court martial, duly convened by the President, and was found guilty of violation of the 96th Article of War and was sentenced to be reduced in rank to the foot of the list of officers of the grade, to be reprimanded and to forfeit $150 per month for a period of 24 months. May 21, 1936, a duly convened Board of Review reversed the action of the court martial on the ground that record of trial was legally insufficient to support the findings of guilty and the sentence.

10. On April 11, 1936, plaintiff addressed a written communication through the Judge Advocate General to the Adjutant General making application for retirement in the following language:

> 1. The Act of June 30, 1882, c. 254, Sec. 1 (22 Stat. 118; 10 U. S. C. A., Sec. 942), provides as follows:
> "Sec. 942. *Right of officer to retirement after forty years of military service.*—When an officer has served forty years either as an officer or soldier in the regular or volunteer service, or both, he shall, if he make application therefor to the President, be retired from active service and placed on the retired list (June 30, 1882, c. 254, Sec. 1, 22 Stat. 118) (10 U. S. C. A., Sec. 942)."
> 2. Application of the undersigned is hereby made to be immediately retired from active service and placed on the retired list in accordance with the provisions of the above law.
> 3. In connection with the above, reference is hereby made to the military record of the undersigned, from which it will appear that I have been continuously in

the military service since April 11, 1896; reference is also made in this respect to the Army Register and to the Opinion of the Judge Advocate General, July 2, 1928 (210.85).

11. May 13, 1936, the Secretary of War wrote the Attorney General enclosing a certified copy of the proceedings in the case of the *United States* v. *Joseph I. McMullen* and requesting an opinion as to the present military status of Colonel McMullen.

May 21, 1936, the Attorney General advised the Secretary of War that in his opinion upon the date of the entry of the judgment of conviction and sentence plaintiff became immediately incapable of holding any office of honor, trust, or profit under the Government of the United States. 38 Op. A. G. 468.

12. Special Orders No. 127 of the War Department, dated May 28, 1936, sets out the following in printed form:

> 6. Announcement is made that by operation of section 203, title 18, United States Code, Colonel *Joseph I. McMullen*, Judge Advocate General's Department, ceased to be an officer of the Army on May 8, 1936.

This announcement was conveyed to and received by the plaintiff on the day of its date.

13. Plaintiff was not retired as a result of his application of April 11, 1936, quoted in finding 10.

14. Plaintiff's application for retirement after forty years' service and the findings of the Army Retiring Board recommending plaintiff's retirement for physical disability incident to the service were never laid before the President for his approval or disapproval.

15. During the period here pertinent, it was necessary that there be a vacancy in the office of colonel before another person could be appointed as colonel, and when such a vacancy occurred in the regular Army it was filled by promoting the top-ranking or senior lieutenant colonel on the promotion list.

16. May 25, 1936, the President of the United States submitted to the Senate of the United States, for its advice and consent, the nomination of Lieutenant Colonel James Howard Laubach, Q. M. C., to be colonel from May 14, 1936.

May 30, 1936, the President withdrew this nomination. On this withdrawal of the nomination of Lieutenant Colonel Laubach the President wrote the following note:

> NOTE: This message is submitted for the purpose of correcting the dates of rank of the nominees due to the separation of Colonel Joseph I. McMullen, Judge Advocate General's Department, as of May 8, 1936, from the Army through the operation of Section 203, Title 18, United States Code.

The Executive Journal of the United States Senate for May 25, 1936 (74th Congress, 2nd Session), shows the following entry on page 558:

THE WHITE HOUSE, *May 25, 1936.*

To the Senate of the United States:

* * * * *

Paragraph 2. I nominate the following-named officers for promotion in the Regular Army of the United States:

To be colonel

Lieutenant Colonel James Howard Laubach, Quartermaster Corps, from May 14, 1936.

* * * * *

FRANKLIN D. ROOSEVELT.

To the Committee on Military Affairs.

17. May 30, 1936, the President again sent to the Senate for its advice and consent the nomination of Lieutenant Colonel Laubach, Q. M. C., to be colonel from May 9, 1936.

18. June 1, 1936, the Acting Secretary of War, General Malin Craig, sent the following message to Senator Morris Sheppard, Chairman of the Senate Committee on Military Affairs:

> A message withdrawing the nomination of Lieutenant Colonel James Howard Laubach, Quartermaster Corps, for promotion to the grade of colonel with rank from May 14, 1936, has been sent to the President together with a message of renomination for his promotion to the grade of colonel with rank from May 9, 1936, to fill a vacancy created through the separation from the Army of Colonel Joseph I. McMullen, Judge Advocate General's Department, as of May 8, 1936.

For your information in this connection, I am inclosing a copy of an opinion rendered by The Attorney General, to the effect that under operation of Section 203, Title 18, United States Code, Colonel McMullen ceased to be an officer of the Army on May 8, 1936, the date of entry of the judgment of conviction and sentence in his case, a copy of an opinion of The Judge Advocate General in the premises, and a copy of the Special Orders of the War Department announcing the separation of Colonel McMullen from the service.

19. The printed Executive Journal of the United States Senate for the 2d Session of the 74th Congress, embracing parts of the proceedings of the Senate in Executive Session on the calendar days of Saturday, May 30, 1936, pages 609, 615; Friday, June 5, 1936, page 665; and Monday, June 8, 1936, page 685, sets forth the nomination sent from the White House by the President on May 30, 1936, of Lieutenant Colonel James Howard Laubach, Q. M. C., to be colonel from May 9, 1936, and also the withdrawal by the President of the nomination of Lieutenant Colonel James Howard Laubach, Q. M. C., to be colonel from May 14, 1936, together with the President's announcement of his reason for this withdrawal. The following entry appears on page 685 of said Executive Journal for June 8, 1936.

When the nomination of certain persons for appointment, transfer, or promotion in the Army were announced,

On motion by Mr. Sheppard, and by unanimous consent, it was

Resolved, That the Senate advise and consent to the appointment of the following-named persons to the offices named agreeably to their respective nominations en bloc:

* * * * *

PROMOTIONS IN THE REGULAR ARMY

* * * * *

James Howard Laubach, colonel, Quartermaster Corps.

20. After the President had sent the name of Lieutenant Colonel Laubach to the United States Senate to be and become colonel in the Quartermaster Corps, and after the

Senate of the United States had given its advice and consent thereto on June 8, 1936, the President completed said appointment and on June 17, 1936, executed and caused to be delivered a commission to the former Lieutenant Colonel Laubach as colonel in the Quartermaster Corps, the appointment dating from May 9, 1936.

21. June 23, 1936, A. W. Brown, Major General, The Judge Advocate General, addressed the following communication to the Chief of Staff:

> 1. Colonel Joseph I. McMullen was indicted by the grand jurors in the Supreme Court of the District of Columbia, April Term, 1935, for violation of Section 203, title 18, United States Code, which indictment was filed in open court June 6, 1935. On February 20, 1936, Colonel McMullen was tried by a general court martial convened by the President and was found guilty of violation of the 96th Article of War and sentenced to be reduced in rank to the foot of the list of officers of his grade, to be reprimanded by the reviewing authority, and to forfeit $150 per month for a period of twenty-four months. However, before final action could be taken by the War Department in his case he was tried in the civil court upon the above-mentioned indictment, and on April 30, 1936, was found guilty in the manner and form charged in the first count of the indictment. On May 8, 1936, the court sentenced him to be imprisoned in the Washington Asylum and Jail for the period of six months and to pay a fine of $1,000, the sentence to take effect from and including the date on which it was imposed. The question as to the status of Colonel McMullen which resulted from this conviction and sentence was submitted to the Attorney General by the War Department under date of May 13, 1936, and on May 21, 1936, the Attorney General expressed the view that upon the date of the entry of the judgment of conviction and sentence of Colonel McMullen under section 203, *supra*, he became immediately incapable of holding any office of honor, trust, or profit under the Government of the United States.
>
> 2. By paragraph 6, Special Orders No. 127, War Department, May 28, 1936, based upon the opinion of the Attorney General, it was announced that by operation of section 203, title 18, United States Code, Colonel McMullen ceased to be an officer of the Army on May 8, 1936. It is understood that Colonel McMullen's successor has been confirmed by the Senate. As it is the

> view of the War Department that Colonel McMullen has ceased to be an officer of the Army any action by the President approving the court-martial sentence would be a futile gesture as no part of the sentence, except possibly the forfeiture of eight days' pay could be executed. Moreover it appears that any action by the President upon the sentence at this time would probably be void for want of jurisdiction.
>
> 3. In view of the foregoing I recommend that the record of Colonel McMullen's trial by general court martial be filed in this office without further action at this time. Similar action has been taken in cases where the officer was permitted to resign before action was taken on the sentence by the President.

22. At page 143 of the Army List and Directory of April 20, 1936, an official record of the War Department, the promotion list of lieutenant colonels for the pertinent period involved in this suit is set out. It shows the top-ranking lieutenant colonels in the following order:

1. Doak, Sloan, Cav.
2. Sullivan, John S., Inf.
3. Collins, James L., F. A.
4. McChord, William C., A. C.
5. Henry, William R., F. A.
6. Laubach, James H., Q. M. C.
7. Dusenbury, Ralph W., Inf.

The above-named lieutenant colonels were thereafter appointed in the order named to fill vacancies *vice* the immediate former incumbents of those offices. Lieutenant Colonel James Howard Laubach was appointed colonel *vice* Joseph I. McMullen.

23. The Vacancy Book, an official register of the War Department, sets forth an entry which denotes that the name of James Howard Laubach, Q. M. C., was registered therein as having been promoted from lieutenant colonel to colonel, *vice* Colonel Joseph I. McMullen, J. A. G. D., "who ceased to be an officer on May 8, 1936."

24. December 2, 1939, the plaintiff wrote the President of the United States the following letter:

> I hereby request that you direct the Secretary of War to issue an appropriate order for my retirement from the Army as of (1) July 1, 1934, on account of physical

disability, found by an Army Retiring Board shortly prior to that date, or (2) as of April 11, 1936, on which date I made application for retirement after forty years' service.

I submit the following facts, points, and authorities in support of my request:

I was indicted, tried, and convicted of violating 18 U. S. C. A., Section 203, between June 5, 1935, and May 8, 1936. I appealed my conviction which was reversed March 21, 1938 (96 Fed. 2nd 574), and upon June 30, 1939, a *nolle prosequi* was entered.

Before July 1, 1934, after my retirement for physical disability had been recommended by an Army Retiring Board, and despite the fact that their finding was duly approved by the President, my order of retirement was postponed by request of the then Chairman of the Military Affairs Committee of the House, and no further action taken. The Attorney General (19 Opinions 202) has held that when the President has approved the findings of a retiring board, his power over the case is exhausted.

On April 11, 1936, *prior* to the date of my conviction, I made application for retirement after forty years' service, on which no action has been taken. The Act of June 30, 1882, C. 254, Section 1 (22 Stat. 118; 10 U. S. C. A., Section 942), provides that when an officer has served forty years he *shall* be retired upon application to the President.

The said statute under which I was later convicted carries the penalty of imprisonment, fine, and disqualification to thereafter hold office under the United States. Execution of my sentence was *automatically* stayed upon appeal but the Attorney General (38 Opinions 468) held *without* the authority of an adjudication of the disqualification provision of the said statute, and *without* a Federal decision on the subject, that I ceased to be an officer on May 8, 1936, and I was later advised to that effect by the Secretary of War.

I am listed in the Army Register of 1937 as having been *dismissed* as of said date of May 8, 1936. Article of War 118, Section 1, Chapter 2, Act of June 4, 1920 (41 Stat. 811), provides that no officer shall be dismissed except by sentence of a general court martial.

The said *nolle prosequi* having been entered, my legal status is the same as that before my said indictment. I have been, however, by reason of said Opinion of the Attorney General, deprived of my office and the emoluments thereof, without due process of law.

In the more than five years since my retirement was postponed before July 1, 1934, I have been ill, without funds since May 8, 1936; engaged in preparation for trial and appeal, and on the said date the *nolle prosequi* was entered I became afflicted with a nerve affection necessitating a brain operation from which I have just sufficiently recovered to present this request.

I therefore request that you direct the Secretary of War to issue an appropriate order for my retirement by reason of the finding by an Army Retiring Board of my physical disability approved by the President prior to July 1, 1934, or for retirement after forty years' service as of the date of my application on April 11, 1936, as required by mandate of statute made and provided.

Respectfully,

JOS. I. MCMULLEN,
Colonel, United States Army.

The statements made in the fourth paragraph of the above letter relating to an alleged approval by the President of the action of an Army Retiring Board, to wit: "and despite the fact that their finding was duly approved by the President" and also the statement in the last paragraph, to wit: "finding by an Army Retiring Board of my physical disability approved by the President" are incorrect. The recommendation of the Army Retiring Board was never acted upon by the President.

25. January 19, 1940, the Attorney General advised the Secretary of War that he desired further information relative to the request of Colonel McMullen to be placed on the retired list. Pursuant to this request the matter was referred to the Judge Advocate General, who, on February 8, 1940, wrote a memorandum which was approved by the Secretary of War February 16, 1940. This memorandum is in evidence as defendant's exhibit A, pages 50–53, and is made part hereof by reference.

26. May 14, 1940, the Attorney General wrote the President, rendering his opinion in connection with Colonel McMullen's request for retirement. 39 Op. A. G. 437.

27. May 17, 1940, the Honorable Edwin M. Watson, Secretary to the President, wrote the following letter to Bruce McMullen, Esquire:

Upon the receipt of your letter of January 2, with enclosed memorandum, regarding the request of Colonel Joseph I. McMullen for retirement, the matter was taken up with the Attorney General.

The President is now in receipt of a letter from the Attorney General stating that, in his opinion, there is no legal basis for the direction to the Secretary of War requested by Colonel McMullen.

28. June 10, 1940, the Honorable Edwin M. Watson, Secretary to the President, wrote the plaintiff the following letter:

Your letter of May 29, addressed to the President, has been referred to the Attorney General who reports that all questions raised by you have already been considered and that there is no occasion for further consideration.

29. Plaintiff has been paid $157.92, the amount of pay due him for the period from May 1 to May 8, 1936.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiff, after a service in the Army which commenced in 1896, and was active except for a period from 1906 to 1916, during which he was on the retired list, was, on June 1, 1934, found by a Board of Medical Officers to be permanently incapacitated for active service as a result of such service. Plaintiff would normally have been retired by the President as a result of his found incapacity, but on June 29 of that year the Chairman of a Subcommittee of the House Committee on Military Affairs wrote the Secretary of War requesting that no action be taken toward placing the plaintiff on the retired list until the Committee had completed its investigation. The reason for this request seems to have been that the Committee thought it had discovered indications of wrongdoing on plaintiff's part. The report and recommendations of the Retiring Board were, as a consequence, merely filed in the War Department, and were never laid before the President for his action.

On June 6, 1935, plaintiff was indicted in the then Supreme Court of the District of Columbia, a trial court, for having in 1932, in violation of Section 203, Title 18, United States Code, received $1,500 for services rendered to a private corporation in connection with proposed legislation in which the corporation was interested. After a trial, the plaintiff was, on April 30, 1936, found guilty, and was, on May 8, 1936, sentenced to jail for six months and ordered to pay a fine of $1,000. He perfected an appeal to the United States Court of Appeals for the District of Columbia, which appeal had the effect of staying the enforcement of his jail sentence and fine.

Section 203, of the violation of which plaintiff was convicted, provides that one who commits the offense therein forbidden "shall be fined not more than $10,000 and imprisoned not more than two years; and shall moreover thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States."

After plaintiff's sentence on May 8, 1936, the Secretary of War on May 13 requested the opinion of the Attorney General as to plaintiff's military status. The Attorney General on May 21 advised the Secretary that plaintiff had, on May 8, the date of the entry of judgment of his conviction and sentence, become immediately incapable of holding office notwithstanding the pendency of plaintiff's appeal. 38 Op. A. G. 468, 474. In accordance with this opinion the War Department on May 28 issued Special Orders No. 127 in printed form announcing that plaintiff had "ceased to be an officer of the Army on May 8, 1936."

The President, on May 30, 1936, sent to the Senate for its advice and consent the nomination of Lieutenant Colonel Laubach to be colonel from May 9, 1936. On June 1, the Acting Secretary of War wrote to Senator Sheppard, Chairman of the Senate Committee on Military Affairs, stating that the nomination of Lieutenant Colonel Laubach was to fill the vacancy created by "the separation from the Army of Colonel Joseph I. McMullen * * * as of May 8, 1936." The writing further mentioned the judgment of conviction and sentence in plaintiff's case in court, stated the purport of the Attorney General's opinion, and enclosed a copy of it.

The Senate, on June 8, 1936, confirmed the nomination of Lieutenant Colonel Laubach, and he was, on June 17, 1936, commissioned by the President as colonel, to rank from May 9, 1936.

On May 21, 1938, more than two years after plaintiff's sentence in the trial court, the United States Court of Appeals for the District of Columbia reversed the judgment of the trial court and remanded the case to that court for a new trial. *McMullen* v. *United States*, 96 F. (2d) 574. On June 30, 1939, the prosecution was abandoned by the Government by the entry of a *nolle prosequi* in the trial court.

After the court proceedings had thus been terminated in plaintiff's favor, plaintiff, on December 2, 1939, wrote the President requesting that he direct the Secretary of War to issue an order retiring plaintiff from the Army, (1) as of July 1, 1934, on account of physical disability, as found by an Army retiring board before that date, or (2) as of April 11, 1936, on which date plaintiff had, as shown in finding 10, written, through the Judge Advocate General, to the Adjutant General requesting retirement after forty years' service. Plaintiff, in his communication to the President, set out the facts concerning the reversal of his conviction by the Court of Appeals, and the *nolle prosequi* of his case by the Government. He asserted that his status thereupon reverted to what it would have been had he never been convicted and sentenced, but that the War Department had wrongfully persisted in treating his separation from the service as permanent, and unaffected by the subsequent reversal of the conviction.

The President sought the advice of the Attorney General who, in an opinion rendered May 14, 1940, 39 Op. A. G. 437, advised the President that, whether or not the judgment of conviction and sentence against plaintiff in the trial court had permanently separated him from the Army, the appointment by the President of Colonel Laubach as plaintiff's successor and the confirmation of that appointment by the Senate, had effectively removed plaintiff from his office. The President, pursuant to this advice, refused the plaintiff's request. The plaintiff is here suing for (1) $400 as the pay and allowance of a colonel on active duty in the Army

from May 9 to May 28, 1936, the period from his judgment of conviction and sentence on May 8, to the day when Special Orders No. 127, quoted in finding 12, were issued, stating that plaintiff had ceased, by operation of law, to be an officer of the Army on May 8; and (2) retired pay of $375 per month from May 29, 1936, to date, as the pay of a colonel on the retired list with more than thirty years of service.

The questions in the case are (1) whether the lower court's judgment that plaintiff had violated Section 203, Title 18, United States Code, immediately and permanently removed him from his office, though the judgment was appealed from and, on that appeal, reversed; (2) whether plaintiff, when he applied for retirement for forty years' service on April 11, 1936, had had forty years' service within the meaning of the retirement statute, when, during some of the forty years, he had been on the retired list; and (3) whether, regardless of the effect of the judgment of conviction, plaintiff was removed from his office by the appointment by the President of Colonel Laubach and the Senate's confirmation of that appointment.

As to the first question, we think the plaintiff was, by the judgment of guilt, immediately and permanently removed from his office. The purpose of the disqualification provision of the statute is to purge from public offices those who violate the statute. If an appeal from a judgment of guilt were to have the effect of a stay of the operation of the disqualifying provision, the officer, though he had been adjudged guilty, would remain in office for an indefinite period, perhaps for the entire term of his office, pending the appeal. The effect on the public service would be harmful, and could not be cured by any operation of relation back which might be applied when and if the conviction was affirmed on appeal. The officer could, of course, be directed to restore the salary which he had received, or, perhaps, the salary could be withheld from him until the appeal was decided. But the more important thing, the occupancy of the office by a convicted person, and the effects of that occupancy upon the public service, would be irreparable. Even if the appeal, when decided, was successful, and the judgment of guilt was reversed, that would not mitigate the harm to the public service in

the interim. There would be little respect for the convicted public officer, while his conviction stood unreversed, and the repute of the office would be correspondingly damaged. It seems then that the policy of the disqualifying statute requires immediate removal of the officer from his office. Cases in State courts, dealing with this question, are cited and discussed in 38 Op. A. G. 468.

Plaintiff urges that, even if conviction results in immediate removal and the public service is thus purged of the convicted officer, the officer should, if his conviction is later reversed, be treated as if he had been entitled to the office in the meantime, and be paid the salary and allowances of the office. That would be a possible partially reparatory solution, in a situation, for example, where the office remained vacant, so that by the fiction of relation back the convicted officer could be regarded legally as having held the office in the meantime, though he had not physically occupied it. But it would be quite impracticable in most cases, and in the instant one, to construe the disqualifying statute as intending that the office must be left vacant pending the appeal, to insure that there be an opening into which to fit the legal fiction of relation back, so that the erroneously convicted officer might at least receive the salary of which he had been deprived by the erroneous judgment. Posts in the Army, as well as other public offices, must be manned, even though hardships to individuals may result. And if a successor has legally and rightfully and actually occupied the office, it can hardly be said, even by the application of a fiction, that the erroneously convicted officer has also legally occupied it.

Plaintiff, then, would seem not to be entitled to pay from May 8, 1936, the date of the judgment of the trial court, to May 21, 1938, the date of the reversal of the judgment by the Court of Appeals. And we think plaintiff's right is no stronger after the date of the reversal. As we have said, his right to the office was not merely suspended by his conviction and appeal. He was out of the office, and Colonel Laubach was in it. Colonel Laubach's title to the office was the usual, permanent title, and there was no reason why he should have been ousted from it to repair a hardship to

plaintiff. If Colonel Laubach had been regarded as automatically demoted by plaintiff's vindication, he would no doubt have found his former office filled by another, and a whole chain of demotions might have been necessary to make plaintiff's former office available to him. Even if we are wrong in our conclusion as to the effect of plaintiff's conviction as an immediate and permanent removal from his office, our answers to the other two questions would still preclude recovery by him.

We consider now plaintiff's contention that when, on April 11, 1936, he made application to The Adjutant General for retirement for forty years' service, he thereupon became a retired colonel, and hence the appointment of Colonel Laubach in May of that year was not to plaintiff's then office, but to a vacant office from which plaintiff had retired a month before. It will be observed that this contention, if valid, would not affect our conclusion that plaintiff was separated from his office by operation of law, when judgment of conviction was entered against him. The statute would operate to separate an officer on the retired list from his office just as it would to separate an active officer from his office. Hence the Government's first ground of defense would still be valid. However, as to the Government's second ground of defense, that the appointment of Colonel Laubach to plaintiff's office resulted in an effective dismissal of plaintiff from that office, that ground would be considerably shaken if we should conclude that plaintiff had, a month before the appointment of Colonel Laubach, vacated the office of an active colonel and passed to that of a colonel on the retired list.

The Government, in response, contends that plaintiff had not had forty years of service within the meaning of the Act of June 30, 1882, Ch. 254, Sec. 1 (22 Stat. 118; U. S. C., Title 10, Sec. 942), upon which he claimed his right to retirement. The Government urges that the ten years from 1906 to 1916 during which plaintiff was on the retired list, may not be counted to make up the required forty years. We think the Government's contention is correct. Section 942 is as follows:

When an officer has served forty years either as an officer or soldier in the regular or volunteer service, or both, he shall, if he make application therefor to the President, be retired from active service and placed on the retired list.

While a retired officer or soldier is, for some purposes, in the military service, *United States* v. *Tyler*, 105 U. S. 244, we think he is not in the service within the meaning of Section 942. It would be strange if an officer, many of whose years of "service" had been as a retired officer, could count all those years to make up forty, if he happened, at the end of the fortieth year, to be in active service, while another officer, with the same number of years of each kind of service, could not do so because he was in a retired status when the forty years ran out. It seems clear that the latter could not "be retired from active service and placed on the retired list." The question has not heretofore been litigated, but the interpretation given to the section by the War Department has been in accord with the Government's contention.

Since we think plaintiff was not qualified for retirement, we do not reach the further objections raised by the Government to this theory of plaintiff's claim that (1) the plaintiff did not apply to the President, as the statute requires, but to the Adjutant General, and (2) even if plaintiff had been qualified and had made a proper application, he could not have acquired the status of a retired officer without affirmative action by the President placing him upon the retired list.

We consider now the third question stated above, viz., whether, regardless of the effect of the judgment of conviction, plaintiff was removed from his office by the appointment by the President of Colonel Laubach, and the Senate's confirmation of that appointment. The second opinion of the Attorney General, 39 Op. A. G. 437, given after plaintiff's conviction had been reversed by the Court of Appeals, and the prosecution had been abandoned by the Government, answered this question in the affirmative, as we have said above. Plaintiff disputes this conclusion, relying principally upon Article 118 of the Articles of

War. (U. S. C., Title 10, Sec. 1590). The text of that Article is as follows:

> No officer shall be discharged or dismissed from the service except by order of the President or by sentence of a general court-martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a court-martial or in mitigation thereof; but the President may at any time drop from the rolls of the Army any officer who has been absent from duty three months without leave or who has been absent in confinement in a prison or penitentiary for three months after final conviction by a court of competent jurisdiction.

Since 1936 was in time of peace, the article on its face seems to support plaintiff's position. But the Supreme Court has repeatedly held that the tenure of office statutes, enacted by Congress during its controversy with President Johnson about reconstruction policy, do not prevent the removal of an officer by the joint action of the President in appointing his successor and the Senate in ratifying the appointment. In *Blake* v. *United States*, 103 U. S. 227, and *Wallace* v. *United States*, 257 U. S. 541, the history of the statutes and the reasons for the interpretation which the Supreme Court has given them, are set out and will not be repeated here. According to these decisions, the opinion of the Attorney General was correct. Plaintiff urges that the President did not intend, by appointing his successor, and the Senate did not intend, by confirming that appointment, to dismiss him from the service, since both the President and the Senate thought that plaintiff was already separated from the service by the judgment of conviction against him. But in the *Blake case* the facts were similar in that regard, the President and the Senate thinking that Blake had effectively resigned before his successor was appointed, and Blake, in his suit for pay brought some years later, claiming that his purported resignation was void because he was insane when he offered it. Yet the court held that, whether Blake's resignation was effective or void, he was superseded by his appointed successor and was no longer entitled to pay. The beliefs of the President and the Senate that they were filling an existing vacancy, rather than creating one and filling it by the same acts of appointment and confirmation, thus seem to be im-

material. Hence this second ground relied on by the Government is also a valid defense to the plaintiff's claim. Plaintiff is not entitled to recover. His petition will be dismissed.

It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

BLANCHARD BALDWIN v. THE UNITED STATES

[No. 45343. Decided December 6, 1943]

On the Proofs

Pay and allowances; "discharge" by transfer of sailor to Fleet Reserve; right to travel pay.—Transfer of a sailor from active duty in the Navy, under the provisions of the statute (34 U. S. Code, 854b), to the Fleet Reserve is not a "discharge" within the meaning of the Act of February 28, 1919, as amended, so as to entitle him to travel allowance to place of last enlistment, where such transfer is for the convenience or enrichment of the sailor.

Same; administrative interpretation.—In the cases of *United States* v. *Sweet*, 189 U. S. 471 (37 C. Cls. 561 reversed), and *United States* v. *Barnet*, 189 U. S. 474 (37 C. Cls. 49 reversed), it was held that the administrative interpretation had given to the word "discharge" in the statute the restricted meaning contended for by the Government, so that the burden had been placed upon the claimant, when the War Department had refused him travel pay, of showing that his "discharge," occurring before the normal termination of his service, was not for his own convenience. See also *Price* v. *United States*, 4 C. Cls. 164.

Same.—The task of giving meaning to ambiguous words in a statute falls first upon the executive department which must put the statute into practice, and if the meaning so given is a fair application of the probable intent of Congress, courts should not upset that meaning in subsequent litigation.

Same; reasonable interpretation of ambiguous word.—It was reasonable for the Department, in giving meaning to an equivocal word in the statute, to say that the word (discharge) does not apply to a transfer from active duty to the Fleet Reserve when the application for transfer by a sailor who had earned the right to retire, or transfer, was so timed with regard to an extension of his enlistment as to give him two travel allowances within a period of one month.

The Reporter's statement of the case:

Mr. Harvey C. Long for plaintiff. *Mr. Fred W. Shields* and *Messrs. King & King* were on the briefs.

Mr. E. E. Ellison, with whom was *Mr. Wilbur R. Lester* and *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows upon the agreed statement:

1. Plaintiff enlisted in the United States Navy as Apprentice Seaman on March 27, 1917, at Newport, Rhode Island, giving date and place of birth as March 14, 1897, Newton, Massachusetts. On August 14, 1919, he was discharged as Ship's Cook, 4th Class, from the Naval Training Station, Newport, Rhode Island, with an honorable discharge; reenlisted on September 27, 1920, as a fireman, 3rd class, at Providence, Rhode Island; discharged on October 2, 1923, as Fireman, 1st Class, from the Receiving Barracks, Hampton Roads, Virginia, with an honorable discharge; reenlisted on October 30, 1923, at Providence, Rhode Island, and discharged on October 29, 1927, as Fireman, 1st Class, from the *U. S. S. Bushnell* with an honorable discharge; reenlisted on October 31, 1927, at Providence, Rhode Island, and honorably discharged September 5, 1934, as Machinist's Mate, 2nd Class, from the *U. S. S. Dobbin;* reenlisted on board the *U. S. S. Dobbin* on September 6, 1934, at Norfolk, Virginia. He executed an extension of enlistment for a period of 3 years effective on board the *U. S. S. Astoria* at Long Beach, California, September 6, 1938.

2. Plaintiff, on October 4, 1938, while serving aboard the *U. S. S. Astoria*, made application for transfer to the Fleet Naval Reserve, under the provisions of Section 203 of the Naval Reserve Act of June 25, 1938 (52 Stat. 1178). His application was approved on October 25, 1938, to be effective not earlier than October 28, 1938, and on November 2, 1938, he was transferred to the Fleet Naval Reserve, Class F-4-D, and was immediately released from active duty and placed on the inactive list as Machinist's Mate, 2nd Class. At the time of said transfer the *U. S. S. Astoria* was at the Navy Yard, Mare Island, California.

3. Upon, and because of plaintiff's extension of enlistment for 3 years on September 6, 1938, at Long Beach, California, he was paid a travel allowance at 5 cents per mile from that point to Norfolk, Virginia, in a total sum of $145.10.

4. Upon his transfer to the Fleet Naval Reserve, on November 2, 1938, he was not paid a travel allowance.

5. Plaintiff presented to the office of the Comptroller General a claim for travel allowance from Mare Island, California, to Norfolk, Virginia, upon his transfer on November 2, 1938, to the Fleet Naval Reserve, which claim was disallowed by settlement dated May 3, 1939.

The matter was further considered by the Office of the Comptroller General, and in decision dated August 17, 1939 (19 Comp. Gen. 225), the previous action was sustained.

Plaintiff requested a further consideration of his claim, and in a decision of September 6, 1940, his claim was again denied by the Comptroller General.

6. Travel allowance, as computed by the General Accounting Office, from Mare Island, California, place of transfer to the Fleet Naval Reserve, to Norfolk, Virginia, place of acceptance for enlistment, 3,166 miles at 5 cents a mile, amounts to a total sum of $158.30.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiff completed twenty years of active service in the Navy during an enlistment which expired on September 6, 1938. By reason of his twenty years' service, he became eligible for transfer to the Fleet Reserve at one half of base pay.[1] He did not, however, apply for such a transfer, at or before the termination of his enlistment, but extended his enlistment for three years. By doing so he became entitled to, and received, a cash travel allowance of five cents a mile from Long Beach, California, to Norfolk, Virginia, the place of his last enlistment. Within a month after extending his enlistment he applied for and on Novem-

[1] Act of June 25, 1938, Ch. 690, Title II, § 203, 52 Stat. 1178, 34 U. S. C. § 854b.

ber 2, 1938, received a transfer to the Fleet Reserve. He then claimed a travel allowance from Mare Island, California, where his ship was stationed when he was transferred to the Fleet Reserve, to Norfolk, Virginia, where, as we have seen, he last enlisted. The Navy refused him this allowance. He presented a claim to the Comptroller General, who also denied him the allowance, 19 Comp. Gen. 225, *Id.* 451. This suit followed.

Plaintiff bases his claim upon the Act of February 28, 1919, 40 Stat. 1203, as amended by the Act of September 22, 1922, 42 Stat. 1021, which provides as follows:

> Hereafter an enlisted man discharged from the Army, Navy, or Marine Corps, except by way of punishment for an offense, shall receive 5 cents per mile for the distance from the place of his discharge to the place of his acceptance for enlistment, enrollment, or muster into the service: * * *

He says that a transfer to the Fleet Reserve, when accompanied by the release of the sailor from active duty, is a discharge, within the meaning of this statute, and that the Navy Department, the Comptroller of the Treasury, and the Comptroller General have for a long time so interpreted the statute. The Government concedes this contention, in part, but urges that the Department and the accounting officials have granted the travel allowance, upon transfers to the Fleet Reserve, not in all cases, but only under certain conditions which were not complied with in plaintiff's case. It says that the word "discharged," as used in the statute, has been administered for many decades as not including even a complete separation from the service if that separation was made for the convenience of the man "discharged." This interpretation is embodied in Article 2503–11 (i) of the United States Navy Travel Instructions, and has been approved by the accounting offices of the Government. 3 Comp. Dec. 397, 398; 2 Comp. Gen. 612, 615. In the case of *United States* v. *Sweet*, 189 U. S. 471 (see also, *United States* v. *Barnett*, 189 U. S. 474), it was held that the administrative interpretation had given to the word "discharged" in the statute the restricted meaning contended for by the Government, and that where an officer had

obtained his discharge from the Army by resignation, he was not entitled to the statutory travel allowance. In the *Sweet* and *Barnett cases* the qualified nature of the right to travel pay seems to have been recognized by placing the burden upon the plaintiff, when the Department had refused to pay him travel pay, of showing that his "discharge," occurring before the normal termination of his service, was not for his own convenience. This court, in *Price* v. *United States*, 4 C. Cls. 164, expressed the view that the Department's practice of not allowing travel pay when the discharge was pursuant to a resignation, was a proper application of a similar statute.

It is urged that plaintiff's case differs from those discussed above, in that they involved resignations which the Department was free to accept or reject and which, therefore, it could accept upon the terms laid down in its regulations or practice, while plaintiff had an unqualified right, under the statute, to transfer to the Fleet Reserve, he having completed the necessary twenty years of service. We think, however, that this difference is not conclusive. The real question is whether the word "discharged," in the statute, applies to plaintiff's situation. It certainly does not so unequivocally apply as to leave no room for another interpretation. Perhaps the primary meaning of the word discharge is action beginning with a superior and operating upon an inferior. See *United States* v. *Sweet*, *supra*. That meaning would imply, to some degree, that it was an act *in invito*. Since transfer to the Fleet Reserve is at the sailor's will and choice, his separation from the active service is not a "discharge" within that meaning of the word. But, since the Government holds out to the men this privilege of transfer, after twenty years' service, and regards the Fleet Reserve as a useful adjunct of the Navy, a normal transfer to it is, though at the option of the sailor, not merely for the convenience of the sailor but for the good of the Navy. It was therefore reasonable for the Department to interpret the statute as applying, in the ordinary case, to this sort of separation from active service.

But was it not also reasonable for the Department, in giving meaning to an equivocal word in the statute, to say

that it does not apply to a transfer so timed, with regard to an extension of his enlistment, by the sailor who has the option, that it serves the purpose of giving him two travel allowances within a period of one month, since the purpose of the transfer, *so timed*, or at least the purpose of the timing, is the enrichment of the sailor? We think so.

The plaintiff gives no reason for his having transferred to the Fleet Reserve, so soon after his extension of his enlistment, which would contradict the natural supposition of the Department that his purpose was to get the two travel allowances. The task of giving meaning to ambiguous words in a statute falls first upon the executive department which must put the statute into practice. If the meaning given by the Department is a fair application of the probable intent of Congress, courts should not upset that meaning in subsequent litigation.

Plaintiff's petition will be dismissed.

It is so ordered.

LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.
WHITAKER, *Judge*, dissents.
JONES, *Judge*, took no part in the decision of this case.

CLINTON TRUST COMPANY v. THE UNITED STATES

[No. 45514. Decided December 6, 1943]

On the Proofs

Capital stock tax; insolvent bank; statute of limitation.—Where plaintiff's claim for refund of capital stock taxes for the tax years 1934 to 1937, inclusive, were rejected by the Commissioner of Internal Revenue by letter of May 26, 1939, on erroneous grounds stated therein; and where by letter of December 20, 1939, the Commissioner informed plaintiff that its claims for refund for the years 1934 to 1937 had been rejected by said letter of May 26, 1939, "without consideration on their merits" and that said claims "are rejected in full"; it is *held* that under the provisions of section 3772 of the Internal Revenue Code suit filed July 18, 1941, is barred by the statute, which provides that suit may not be brought after the expiration of two years from date of notice of rejection.

Syllabus

Same.—Where the Commissioner of Internal Revenue gave reconsideration to plaintiff's claim, rejected on erroneous grounds on May 26, 1939, and again rejected the claim, on other grounds, on December 20, 1939; such reconsideration and action did not toll the statute of limitation in view of the provisions of paragraph (a) (3) of section 3772 of the Internal Revenue Code, as amended, which provides that "any consideration, reconsideration or action," under the statute, "shall not operate to extend the period within which suit may be begun."

Same; rejection of "part of claim" within meaning of statute.—Where the statute [Internal Revenue Code, section 3772, (a) (2)] provides that no suit shall be brought on a rejected claim after the expiration of two years from the date of "notice of disallowance of the part of the claim to which suit or proceeding relates;" the expression "part of the claim", in the statute, refers to a part of the money involved in the claim, and not to one or more but less than all the grounds of the claim.

Same; rejection upon reconsideration.—Where the Commissioner in a letter of rejection dated May 26, 1939, did not reserve any question for further consideration, but merely gave an erroneous reason for his disallowance, and later, on December 20, 1939, upon reconsideration, gave a better reason, such reconsideration and action could not, under the statute, extend the period of limitation.

Same; liberal construction of remedial statute.—Section 3798 of the Internal Revenue Code, (which is section 22 (a) of the Act of March 1, 1879, as amended by the Revenue Act of 1933) relating to exemption of insolvent banks from taxation, being a remedial statute, is to be construed liberally. *Johnston* v. *United States*, 17 C. Cls. 157, cited.

Same; lien upon future earnings in bank reorganization.—The plan of reorganization of the banking institution in the instant case, whereby the depositors and stockholders agreed to forego any rights which they might otherwise have had to share in certain of the net earnings of the corporation, gave the depositors a "lien" upon those earnings within the meaning of the statute. (Internal Revenue Code, section 3798).

Same; definition of "lien" as used in statute.—Where the statute (Internal Revenue Code, section 3798) speaks of a "lien upon subsequent earnings," it means a preferential right in such earnings made superior by a reorganization agreement to rights which other persons would have had but for the agreement.

Same; insufficient proof to justify recovery.—In the instant case, it is *held* that plaintiff has not shown that the collection of the capital stock taxes for the tax years 1938, 1939 and 1940 did diminish the plaintiff's assets which would otherwise have been available for the payment of the depositors, and plaintiff is not entitled to recover.

Same; tax payment deferred by statute.—The statute does not permanently forswear the collection of taxes for the benefit of depositors of an insolvent bank but only defers the collection to the extent to which the tax money goes to pay the depositors.

Same.—The bank and its owners are not intended to gain or the Government to lose taxes as a result of the application of the statute; and the taxes are therefore collectible, and collectible immediately, out of any part of the earnings of the bank, which, if not paid out for taxes, would still not be paid to the depositors.

The Reporter's statement of the case:

Mr. Frederick L. Pearce for the plaintiff. *Messrs. Morris, KixMiller & Baar* were on the brief.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff, Clinton Trust Company, is a corporation duly organized and existing under the laws of the State of New Jersey, with its principal office at 505 Clinton Avenue, Newark, New Jersey. It seeks in this suit to recover an aggregate sum of $5,343.17 of capital stock taxes and interest paid thereon for the years ended June 30, 1934, through June 30, 1940, inclusive, with such interest as is allowable by law under the provisions of Section 22 of the Act of March 1, 1879, as amended. Plaintiff has been empowered, since prior to the year 1933, to conduct a banking and trust company business, a substantial portion of which has consisted, and consists, of receiving deposits and making loans and discounts.

2. Plaintiff, due to insolvency, was closed and its banking operations were suspended on March 4, 1933, at which time its liability to its depositors, as general creditors, was $3,617,-000, its loans and discounts amounted to $1,653,000, and its total acceptable assets as valued by State and Federal authorities amounted to not more than $3,359,000. Plaintiff remained closed until a plan of reorganization adopted by its board of directors on December 26, 1933, was put into effect on May 7, 1934.

3. Under this plan, the depositors received, for 50% of their claims, deposits of $1,808,700 in the reorganized trust company; plaintiff was released from liability as to the other 50%, and the depositors accepted, in lieu of one half of that 50% claims in the form of participation certificates in the sum of $903,896 against certain assets segregated and transferred to a corporate agent, the newly created Newark Mortgage Company, for liquidation; and in lieu of the remaining half of 50% of their claims amounting to $903,958.27, the depositors accepted redeemable Class B 3% Preferred Stock of a par value of $451,979.13, par $25 per share, redeemable at $50 per share, in the reorganized trust company.

4. Also as part of the plan of reorganization, an issue of $250,000 par value of redeemable Class A 5% Preferred Stock, prior in all respects to the Class B Preferred Stock, was sold at par to the Reconstruction Finance Corporation; and further Class B Preferred Stock of a par value of $75,000 was sold for $150,000 to the former shareholders of said trust company, the common stock being written down to a total stated value of $1.00 upon the books.

5. The condensed balance sheet of the reorganized Clinton Trust Company as at May 7, 1934, was as follows:

RESOURCES

Cash on hand and due from banks		$1, 351, 535. 30
Stocks and securities		498, 526. 00
Bonds and mortgages		391, 452. 35
Loans and Discounts		996, 629. 45
Banking house, furniture and fixtures		441, 294. 57
Other assets		2, 676. 08
		$3, 682, 113. 75

LIABILITIES

Deposit liability		$1, 808, 701. 39
Special trust accounts		562, 430. 60
Class "A" Preferred stock (Par $250,000) Retirable at Par	$250, 000. 00	
Class "B" Preferred Stock (Par $526,979.13) Retirable at	1, 053, 958.27	
Common stock (Par $700,000) Stated value	1. 00	
Undivided Profits	7, 022. 49	
Total capital and undivided profits		1, 310, 981. 76
		$3,682, 113. 75

6. The charter of plaintiff was also amended to provide in substance: that the common stock should not be entitled to vote or receive any dividends until all the Class "A" and "B" Preferred had been retired; that the holders of Preferred Stock "A" should be entitled to receive when and as declared by the board of directors out of net profits to be determined as therein provided cash dividends at the rate of 5% per annum; that subject to the provisions of sections 8 and 7 (hereinafter referred to) the holders of Preferred Stock "B" should be entitled to receive when and as declared by the board of directors out of net profits cash dividends at the rate of 3% of the par value thereof but that in no event should any such dividends be declared or set apart or paid in respect of such Preferred Stock "B" until all of the issued and outstanding shares of Preferred Stock "A" should have been retired. The amended charter provided the following in respect of the application of net profits:

Application of Net Profits

As long as any shares of preferred stock "A" are outstanding, the trust company, on or prior to each February 1 and August 1, shall apply the net profits, of the trust company, as determined in accordance with section 6 of this Article Fifth, for the six months' period ending on the next preceding December 31 or June 30, as the case may be, to the following purposes and in the following order of priority, and not otherwise:

(1) One-tenth of such net profits for said period shall be carried to a fund to be designated the "surplus fund" until such surplus fund shall amount to 20% of the capital stock of the trust company, and thereafter such surplus fund shall always be equal to 20% of the capital stock of such trust company, and whenever such surplus fund becomes impaired, it shall be reimbursed in the manner provided for its accumulation.

(2) To the payment of dividends on the outstanding preferred stock "A" accrued to such February 1 or August 1, as the case may be; provided, however, that after giving effect to the payment of such dividends, the unimpaired capital of the trust company is not less than the aggregate par value of the preferred stock of all classes at the time outstanding, or the minimum capital required by law, whichever sum is the greater.

(3) To the payment into the preferred stock "A" Retirement Fund (referred to in section 9 of this Article Fifth) of a sum equal to 40% of the remainder, if any, of such net profits, provided, however, that the aggregate amount paid into the preferred stock "A" Retirement Fund in any one year need not exceed 5% of the maximum aggregate par value of the preferred stock "A" at any time outstanding, whether or not any such stock shall have been subsequently retired or the aggregate par value thereof reduced in any manner whatsoever; provided further, however, that unless otherwise elected from time to time, by the trust company by action of its Board of Directors, it shall not be required to make such payment into the preferred stock "A" Retirement Fund except from such net profits as may have accrued from and after December 31, 1935; and

(4) To such lawful purposes as may be determined by the Board of Directors, subject, however, to the provisions of sections 4, 5 and 8 of this Article Fifth.

After all shares of Preferred Stock "A" shall have been retired, and as long as any shares of preferred stock "B" are outstanding, the trust company, prior to each February 1 and August 1, shall apply such net profits to the following purposes and in the following order or priority, and not otherwise:

(1) One-tenth of such net profits for said period shall be carried to a fund to be designated as the "Surplus Fund" until such surplus fund shall amount to 20% of the capital stock of the trust company, and thereafter such surplus fund shall always be equal to 20% of the capital stock of such trust company, and whenever such surplus fund becomes impaired, it shall be reimbursed in the manner provided for its accumulation;

(2) To the payment of dividends on the outstanding preferred stock "B" accrued to such February 1 or August 1, as the case may be, provided, however, that after giving effect to the payment of such dividends, the unimpaired capital of the trust company, is not less than the aggregate par value of the preferred stock of all classes at the time outstanding, or the minimum capital required by law, whichever sum is the greater.

(3) To the payment into the preferred stock "B" Retirement Fund (referred to paragraph 9 of this Article Fifth), to a sum equal to 40% of the remainder, if any, of such net profits; provided, however, that the aggregate amount paid into the preferred stock "B" Retirement Fund in any one year need not exceed 5% of the

maximum aggregate par value of the preferred stock "B" at any time outstanding, whether or not any such stock shall have been subsequently retired or the aggregate par value thereof reduced in any manner whatsoever and

(4) To such other lawful purposes as may be determined by the Board of Directors, subject, however, to the provisions of sections 5 and 8 of this Article Fifth.

It was further provided that no Preferred Stock "A" or "B" should be called or purchased for retirement unless the unimpaired capital, surplus and undivided profits of the trust company should exceed $1,250,000 by an amount at least equal to the sum necessary to effect such retirement. Further provisions were made for the retirement of Preferred Stock "A" and "B" by purchase in event the financial standing of the company warranted it.

7. The Class A Preferred Stock was all redeemed at par plus accrued dividends on January 16, 1936, by arrangement with the Reconstruction Finance Corporation. Since that time dividend distributions have been made upon the Class B Preferred to the extent of 3% per annum on the par value thereof for the period from May 7, 1934, through April 1, 1940, this being at an anual rate of 1.5% upon the amount of the depositors' claims exchanged for said stock. None of said B stock has been redeemed.

8. Plaintiff duly filed Federal capital stock tax returns and paid tax thereon as follows: for the year ended June 30, 1934, on August 30, 1934, and paid $600 on that date; for the year ended June 30, 1935, on July 30, 1935, and paid $652 on that date, and $1,054 and interest of $94.79 on January 18, 1937; for the year ended June 30, 1936, on July 18, 1936, and paid $600 on that date; and for the year ended June 30, 1937, on July 8, 1937, and paid $559 on that date.

9. After the enactment of the Revenue Act of 1938, which in Section 818 amended the provisions of Section 22 of the Act of March 1, 1879, plaintiff on August 9, 1938, filed four claims for refund, one for each year, of the capital stock taxes paid as aforesaid for the years ended June 30, 1934, through June 30, 1937, in the respective amounts of $600, $1,706, $600 and $559, claiming the benefit of that Act as

amended and on the ground, *inter alia*, that the payment of the taxes would diminish the assets necessary for the full payment of the claims of depositors. In connection with the filing on July 27, 1938, of its capital stock tax return for the year ended June 30, 1938, which showed a tax of $600, plaintiff filed a claim for immunity from the tax under the provisions of the Act of March 1, 1879, as amended.

10. The Commissioner of Internal Revenue in a registered Bureau letter dated May 26, 1939, after referring to the claims for refund for the taxable years ended June 30, 1934 to June 30, 1937, and the bases thereof, wrote:

> With respect to your contention that the capital stock tax is unconstitutional, you are advised that inasmuch as the United States Supreme Court has not held the law imposing the capital stock tax to be unconstitutional, the Commissioner of Internal Revenue is clearly without authority to make the refund requested. Rejection of your claims for refund for each of the above years is therefore made on these grounds.

Further in this letter reference was made to the amendment of May 28, 1938, with the following comment:

> Inasmuch as your claims for the refund of $600.00, $1,706.00, $600.00, and $559.00 paid for the years ended June 30, 1934 to June 30, 1937, inclusive, cover tax paid prior to May 28, 1938, the effective date of the amendment, the claims are also rejected on the ground that the bank is not entitled to the immunity claimed.

This letter further requested additional information in support of the claim for immunity for the year ended June 30, 1938. Additional information was filed by plaintiff's counsel by letter dated June 16, 1939, accompanied by a request for reconsideration of said refund claim.

11. A Bureau of Internal Revenue letter dated July 1, 1939, was addressed to plaintiff's counsel, Benjamin Bateman, acknowledging his letter of June 16, 1939. The Bureau letter said, in part:

> You are further advised that the additional evidence submitted shows that the assessment and collection of the tax for the year ended June 30, 1938, would diminish the assets necessary for the full payment of the

claims of the depositors and the claim for immunity from tax assessment and collection for that year is hereby allowed.

12. In connection with the filing on July 30, 1939, of its capital stock tax return for the year ended June 30, 1939, which showed a tax of $577, plaintiff filed a claim for immunity from said tax under the provisions of the Act of March 1, 1879, as amended (Internal Revenue Code Section 3798 as further amended by Section 406 of the Revenue Act of 1939). A letter was addressed to the Commissioner of Internal Revenue from the attorney for the taxpayer under date of September 18, 1939. Receipt of this letter was acknowledged in a Bureau letter dated September 30, 1939. A Bureau letter dated November 27, 1939, requested additional information in reference to the claim for the year ended June 30, 1939; and substantially the same information that had previously been filed under date of June 16, 1939, was filed by plaintiff under date of December 6, 1939.

13. Thereafter, the Commissioner of Internal Revenue addressed to plaintiff a Bureau letter dated December 20, 1939. The letter advised plaintiff, in part, that the claims for refund for the years ended June 30, 1934, through June 30, 1937, "were rejected in Bureau letter of May 26, 1939, without consideration of their merits" and that said claims "are rejected in full"; that the claim for immunity for the year ended June 30, 1938, "is reopened and rejected"; that the claim for immunity for the year ended June 30, 1939, "is also rejected"; and that the taxes for the two latter years would be assessed. In a letter dated December 22, 1939, plaintiff filed further information and a request that the matter be reconsidered, to which a reply was made in a Bureau letter dated February 2, 1940.

14. The capital stock taxes for the years ended June 30, 1938, and June 30, 1939, were paid by plaintiff on February 5, 1940, in amounts of $600 with interest of $50.76 and $577 with interest of $11.31, respectively. Plaintiff on July 31, 1940, duly filed its capital stock tax return for the year ended June 30, 1940, and paid the tax of $639.10 shown thereon.

15. Plaintiff on February 25, 1941, filed three claims for refund, one for each year, of the capital stock taxes and interest paid as aforesaid for the years ended June 30, 1938 through June 30, 1940, in the respective amounts of $650.76, $588.31 and $639.10, claiming the benefit of the Act of March 1, 1879, as amended (and Internal Revenue Code Sec. 3798 as amended) and on the ground, among other things, that the payment of said taxes would diminish the assets necessary for the payment of the claims of the depositors. The three claims were rejected in a registered Bureau letter dated May 2, 1941. The petition in the instant proceeding was filed on July 18, 1941.

16. The Class B Preferred Stock, issued to the depositors in the reorganization in May 1934, was worth not more than $15.00 per share at that time. From that time to the end of 1940, this stock sold in a market in a range from a low of $12.00 per share to a high of $21.00 per share, the first and last sales in this period being at $14.00 per share.

17. In connection with the reorganization in May 1934, it was anticipated that there would be unusually large withdrawals when the trust company would be reopened. In order to provide a cash fund to cover such withdrawals the Class A Preferred Stock mentioned in finding 4 was sold to the Reconstruction Finance Corporation. Contrary to expectation, when the bank reopened withdrawals were small and deposits were large; the extra cash fund proved to be unnecessary. After a time it was realized that the stock had served its purpose; and the Class A stock was retired by mutual agreement with the R. F. C. That retirement was not out of earnings but out of extra cash assets for which there was no further need.

18. The Class B Preferred Stock had a par value of $25.00 per share, but was redeemable at $50.00 per share; $50.00 being the amount of the claim of a depositor which was used in the reorganization to purchase one share at par of $25.00. In connection with the reorganization this preferred stock was carried on the books under two accounts: "Class B Preferred Stock, Par Value $25," a total amount of $526,-979.13; and a so-called "Preferred Stock Retirement Fund," another account for the amount of $526,979.14. The second

account at the date of the reorganization represented the excess of the face value of the claims released by the depositors in exchange for the stock over the par value of the stock.

19. By June 30, 1941, the second account had been reduced to about $506,000; the reduction of some $20,000 having been transferred to reserves set up at the suggestion of the supervising authorities to cover possible losses on assets that had been taken over from the old bank in the reorganization. Some of such reserves, about $6,000, had been set up from surplus and undivided profits, but the earnings had not been sufficient to cover all of the reserves suggested.

20. Dividends had been paid upon the Class A Preferred Stock up to the time it was redeemed on January 16, 1936. Thereafter dividends were paid upon the Class B Preferred at 3% per annum on the par value thereof for the period from May 7, 1934 through April 1, 1940. No dividends have been paid upon the common stock since the reorganization.

21. During the period from July 1936 up to December 31, 1940, plaintiff had set up out of earnings, in accordance with the formula described in finding 6 a total of $11,776.10 in the Class B retirement fund. Thereafter, and after the taxable years in question, certain reserves were set up at the suggestion of the supervising authorities to cover possible losses on assets that had been taken over from the old bank in their reorganization. It was then necessary to transfer the amounts set up in the Class B retirement fund to other reserves.

22. From the time of the retirement of the Class A Preferred stock in January 1936 up to June 30, 1941, the net worth of the plaintiff never reached $1,250,000; the highest amount during that period being slightly more than $1,100,000 on June 30, 1939.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff is a New Jersey trust company, a substantial portion of the business of which, during the period here in question, consisted of receiving deposits and making loans

and discounts. Due to insolvency it closed on March 4, 1933, and remained closed until May 1934, at which time a plan of reorganization previously adopted by its Board of Directors was put into effect.

Under this plan the trust company, as reorganized, was to reopen for business, and the former depositors were to be credited with deposits of 50% of their former deposits. As to the other 50%, the depositors released plaintiff from liability, accepting in exchange for the release (1) participating certificates in certain assets transferred to a corporate agent of plaintiff for liquidation, each depositor's certificate being for one-half of the released 50% of his deposit and (2) such number of shares of redeemable Class B 3% preferred stock in plaintiff company as reorganized, par value $25 per share, redeemable at $50 a share, as would make a par value of one-half of that one-fourth of the depositor's claim not covered by the other provisions described above. To illustrate, one having $200 on deposit when the bank closed received, in the reorganization a deposit of $100, a participation certificate in the liquidation of certain transferred assets for $50, and one $25 par value share of Class B preferred stock. Each $25 share had an actual market value of about $15 a share at the time these shares were given to the depositors. The reorganization plan called also for the amendment of plaintiff's corporate charter to provide, so far as here relevant, that one tenth of the net profits of the company should be placed in a surplus fund, that next the holders of the B preferred stock should be entitled to a cash dividend of 3% per annum, and that 40% of the remainder, if any, of such net profits should be placed in the B preferred stock retirement fund. That stock was, as we have said, of a par value of $25 per share, and redeemable at $50 per share.

From July 1936, to December 31, 1940, the plaintiff had paid the 3% dividends on the preferred stock and had out of earnings placed some eleven thousand dollars in the B stock retirement fund. That money was, after the tax years here in question, on the suggestion of public banking authorities, transferred to other reserves and none of the B stock was redeemed.

The plaintiff filed federal capital stock tax returns for the years ending June 30, 1934, 1935, 1936 and 1937, and paid taxes accordingly. After the Revenue Act of 1938 was enacted, plaintiff filed claims for the refund of these taxes, on the ground that that Act authorized such claims, and on the ground that the capital stock tax was unconstitutional. With its return for the year ending June 30, 1938 plaintiff filed a claim for immunity from the tax for that year on the ground of the 1938 Act. Plaintiff relied then and now relies on Section 3798 of the Internal Revenue Code, which is Section 22 (a) of the Act of March 1, 1879, as amended. The text of the section (U. S. Code, Title 26, section 3798) is in the footnote.[1]

[1] SEC. 3798. EXEMPTION OF INSOLVENT BANKS FROM TAX.

(a) Whenever and after any bank or trust company, a substantial portion of the business of which consists of receiving deposits and making loans and discounts, has ceased to do business by reason of insolvency or bankruptcy, no tax shall be assessed or collected, or paid into the Treasury of the United States on account of such bank, or trust company, which shall diminish the assets thereof necessary for the full payment of all its depositors; and such tax shall be abated from such national banks as are found by the Comptroller of the Currency to be insolvent; and the Commissioner of Internal Revenue, when the facts shall appear to him, is authorized to remit so much of the said tax against any such insolvent banks and trust companies organized under State law as shall be found to affect the claims of their depositors.

(b) Whenever any bank or trust company, a substantial portion of the business of which consists of receiving deposits and making loans and discounts, has been released or discharged from its liability to its depositors for any part of their claims against it, and such depositors have accepted, in lieu thereof, a lien upon subsequent earnings of such bank or trust company, or claims against assets segregated by such bank or trust company or against assets transferred from it to an individual or corporate trustee or agent, no tax shall be assessed or collected, or paid into the Treasury of the United States on account of such bank, or trust company, such individual or corporate trustee or such agent, which shall diminish the assets thereof which are available for the payment of such depositor claims and which are necessary for the full payment thereof.

(c) (1) Any such tax collected, whether collected before, on, or after the date of enactment of the Revenue Act of 1938, shall be deemed to be erroneously collected, and shall be refunded subject

The Commissioner of Internal Revenue wrote plaintiff on May 26, 1939, rejecting plaintiff's claimed ground of refund for the years 1934 to 1937 that the tax was unconstitutional, and further saying

> Inasmuch as your claims for the refund of $600.00, $1,706.00, $600.00, and $559.00 paid for the years ended June 30, 1934 to June 30, 1937, inclusive, cover tax paid prior to May 28, 1938, the effective date of the amendment, the claims are also rejected on the ground that the bank is not entitled to the immunity claimed.

The letter requested further information about the plaintiff's claim for immunity for 1938. That information was furnished, and a request for a reconsideration of the refund claim for the prior years was made. On July 1, 1939, a Bureau letter was sent to plaintiff allowing plaintiff's claim for immunity for the year ending June 30, 1938, on the ground that the payment of the tax "would diminish the assets necessary for the full payment of the claims of the depositors."

On July 30, 1939, the plaintiff, in connection with the filing of its capital stock tax return for the year ended June 30,

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to all provisions and limitations of law, so far as applicable, relating to the refunding of taxes.

(2) Any tax, the assessment, collection, or payment of which is barred under subsection (a) of this section, or any such tax which has been abated or remitted after May 28, 1938, shall be assessed or reassessed whenever it shall appear that payment of the tax will not diminish the assets as aforesaid.

(3) Any tax, the assessment, collection, or payment of which is barred under subsection (b) of this section or any such tax which has been refunded after May 28, 1938, shall be assessed or reassessed after full payment of such claims of depositors to the extent of the remaining assets segregated or transferred as described in subsection (b).

(4) The running of the statute of limitations on the making of assessment and collection shall be suspended, during, and for ninety days beyond, the period for which, pursuant to this section, assessment or collection may not be made, and a tax may be reassessed as provided in paragraphs (2) and (3) of this subsection, and collected, during the time within which, had there been no abatement, collection might have been made.

(d) This section shall not apply to any tax imposed by subchapter A or subchapter C of chapter 9.

1939, again filed a claim for immunity from the tax for that year. Further information was requested by the Bureau and was furnished. On December 20, 1939, the Commissioner wrote plaintiff that its claims for refund for the years 1934 to 1937 had been "rejected in Bureau letter of May 26, 1939, without consideration on their merits," and that those claims "are rejected in full"; that the claim for immunity for 1938 "is reopened and rejected", and that for 1939 "is also rejected" and that the taxes for those two years would be assessed. Plaintiff in 1940 paid the taxes for those years and for 1940, and sues here for the return of the taxes for all the years from 1934 to 1940.

The defendant urges that the plaintiff is, as to the taxes paid for the years 1934 to 1937, barred by the Statute of Limitations, Section 3772 of the Internal Revenue Code, which provides that suits may not be brought "after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates." It says that the Bureau letter of May 26, 1939, set the two-year limitation running, and that therefore this suit, filed July 18, 1941, came too late. Plaintiff claims that the statute did not begin to run until the Commissioner's letter of December 20, 1939, was mailed.

We think the defendant is right as to this point. The Commissioner's letter of May 26, 1939, placed the rejection upon an obviously untenable ground. It rejected the claims on the ground that the taxes had been paid before the effective date of the 1938 amendment, though the statute said in paragraph (c) (1) that "any such tax collected, whether collected before, on, or after the date of enactment of the Revenue Act of 1938, shall be deemed to be erroneously collected, and shall be refunded * * *." When the Commissioner sent this letter, plaintiff must have felt certain that it could obtain a reconsideration by the Commissioner and a more intelligent treatment of its claims. In this effort it succeeded, though the claims were ultimately rejected.

But paragraph (a) (3) of Section 3772 provides that "any consideration, reconsideration, or action by the Commissioner

with respect to such claim following the mailing of a notice by registered mail of disallowance shall not operate to extend the period within which suit may be begun." What occurred here was that the Commissioner reconsidered the claims and placed their rejection upon a more tenable ground. But that did not toll the statute.

Plaintiff claims that the Commissioner here, by his May 26 letter, rejected only a part of the claim, and that his letter of December 20 rejected another part, and therefore the statute did not begin to run as to the latter part, until the December date, according to paragraph (a) (2). We think that the expression "part of the claim", in the statute, refers to a part of the money involved in the claim, and not to one or more but less than all the grounds of the claim. There would be no necessity for mention in the statute of a "part of the claim" in the sense in which plaintiff would have us understand it. If, for example, a taxpayer, in his claim for refund, set up three grounds or reasons why he should get his money back, and the Commissioner wrote him that he had considered grounds (1) and (2) and that, so far as they were concerned, the claim was disallowed, that would not be the "disallowance" of the claim which would set the statute running. It would rather be a statement that the Commissioner had not yet completed his consideration of the claim. If he later disallowed the claim on the third ground also, that would not be a disallowance of a part of the claim, but the first disallowance of the whole claim. The statute would run from that time.

In the instant case the Commissioner did not, in his May 26 letter, reserve any question for further consideration and thus prevent that letter from being a "disallowance". He merely gave a bad reason for his disallowance. Later he reconsidered and gave a better reason, but his reconsideration could not, under the statute extend the period of limitation. We therefore reach the merits of the case only as to the years 1938, 1939, and 1940.

On the merits of the claims for those years, we think the plaintiff is not entitled to recover. We recognize that the policy of the statute on which plaintiff bases its claim

is that the United States does not, as a tax gatherer, desire to compete with the disappointed depositors of an insolvent bank, and that it is willing to defer the collection of its taxes in order to make available to such depositors money which, by certain arrangements with the other persons interested in the bank, has been set aside for the depositors. This Court said many years ago in *Johnston* v. *United States*, 17 C. Cls. 157, 171, that this remedial statute should be construed liberally, and we agree. We have already quoted the statute. Turning to paragraph (b) of Section 3798 we find that plaintiff's depositors did discharge plaintiff from its liability to them. The questions then are (1) did the depositors accept, in lieu of that liability, a "lien" upon subsequent earnings of plaintiff and (2) if so, did the collection of the taxes here in question "diminish the assets" which were "available for the payment of such depositor claims and which are [were] necessary for the full payment thereof."

We think that the plan of reorganization agreed to by the depositors and the stockholders under which the stockholders other than the depositor holders of the Class B preferred stock agreed to forego any rights which they might otherwise have had to share in certain of the net earnings of the corporation, gave the holders of the B stock a "lien" upon those earnings within the meaning of the statute. The statute speaks of a "lien upon subsequent earnings." It is hard to see how Congress could have meant by this expression anything more than a preferential right in such earnings, made superior, by the reorganization agreement, to rights which other persons would have had but for the agreement. Congress cannot have intended a "lien" in the sense of a security interest in existing property or in existing rights against third persons, as there could hardly be a lien in that sense upon subsequent earnings.

As to the second question, we think that plaintiff has not shown that the collection of the capital stock taxes did diminish the plaintiff's assets which would otherwise have been available for the payment of the depositors. The arrangement was, as we have seen, that for $50 of his former $200 deposit, to revert to the illustration used above, a de-

positor received one share of Class B preferred stock, par value $25, market value $15, redemption value $50, and a right that 40% of 90% of the net earnings should be placed in the redemption fund. The statute does not permanently forswear the collection of taxes for the benefit of depositors of an insolvent bank. It only defers their collection to the extent to which the tax money goes to pay the depositors. The bank and its owners are not intended to gain or the Government to lose taxes as a result of the application of the statute. U. S. C., Title 26, Section 3772 (c) (3). The taxes are therefore collectible, and collectible immediately, out of any part of the earnings of the bank which, if not paid out for taxes, would still not be paid to the depositors. Here the 10% first taken out of earnings and placed in a reserve would be in that category, as would also be the 60% of the remaining 90% of earnings left after the other 40% of that 90% had been placed in the redemption fund for the depositors' Class B preferred stock. Whether the reorganization agreement contemplated, as it probably did, that the "net earnings" upon which these percentages should be based were after taxes, or not, plaintiff has not shown to what extent the payment of the taxes diverted money which would otherwise have gone into the depositors' fund. If the tax is made entirely uncollectible, for the time being, as plaintiff claims, because some unproved part of the uncollected tax will go for the benefit of the depositors, it is apparent, upon the percentages present here, that owners other than the depositors are, temporarily, benefiting more from the application of the statute than the depositors are. Congress could not have intended that.

We conclude, therefore, that plaintiff is not entitled to recover, and that its petition should be dismissed. It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

CARL F. A. JOHNSON v. THE UNITED STATES

[No. 45534. Decided December 6, 1943]

On the Proofs

Pay and allowances; increased subsistence and rental allowances; bachelor officer in U. S. Navy with dependent mother.—Following the decision in *Mumma* v. *The United States*, 99 C. Cls. 261, plaintiff entitled to recover.

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea* for the defendant.

The court made special findings of fact as follows:

1. The plaintiff, Carl F. A. Johnson, was appointed an Ensign in the United States Naval Reserve on August 16, 1930; January 19, 1934, he was promoted to the rank of Lieutenant, junior grade, and on November 12, 1941, a commission was issued promoting plaintiff to the rank of Lieutenant from September 21, 1940, which rank he now holds. Plaintiff entered on active duty in the Navy on January 18, 1940, and has been on active duty continuously since that date. He was stationed on board ship where he occupied an officer's stateroom and bath jointly with another officer, except during the interval from December 19, 1940, to January 19, 1941, when he occupied a room in the Hotel Sylvania in Philadelphia, Pa. The hotel quarters were furnished because his quarters aboard ship were not habitable during that time. Plaintiff was a bachelor until his marriage on March 29, 1941.

2. Plaintiff's father died on December 22, 1935. Prior to his death the father had owned a house in Denmark which he sold in 1935 for 19,000 Kroner, including an existing mortgage of 10,000 Kroner. Three thousand Kroner were paid in cash and the balance of the purchase price had been paid to the plaintiff's mother by 1937.

At the time of his death the father owned another house which he left to plaintiff's mother, Mrs. Anna Antoni John-

son. In 1937 the mother sold the house for 15,500 Kroner, including an existing mortgage of 6,500 Kroner. She received 3,000 Kroner in cash and retained a mortgage on the property to secure the balance of 6,000 Kroner, which was payable in semiannual installments of 350 Kroner, or approximately $75.00. The mother received the semiannual payments on the property regularly until August 1939, when the broker who was handling her affairs in Denmark committed suicide. On account of his death, payments were suspended until February 1940, when plaintiff's mother received $65.

Denmark was thereafter invaded by the German Army, which resulted in suspension of further payments to plaintiff's mother until May, 1941, when she received $335 from her Danish property.

3. Plaintiff's mother owns stock in the Pacific Public-Service Company worth seven or eight hundred dollars which she purchased in 1931 for $1,000. She receives an annual income from the stock of $68. In addition, plaintiff's mother owns a one-room apartment house located over her son-in-law's garage in Burlingame, California. She had the apartment built in 1939 at a cost of $850. Her son-in-law owns the lot on which the building is situated, and the apartment was constructed there with the agreement that he would inherit it on her death.

4. At the time she testified in November 1941, plaintiff's mother was 69 years of age. She was not gainfully employed during the period of the claim. Since January 18, 1940, she has resided in her apartment in Burlingame, California, and has not occupied any government quarters.

Plaintiff's mother has one daughter who is married and has two children. The daughter and her husband have contributed nothing toward the support of the mother.

5. The mother's average monthly living expenses amount to $50, consisting of $25 for food, $10 for clothes and household linens, $10 for medical expenses, and $5 for recreation.

Since January 18, 1940, plaintiff has regularly contributed $50 per month toward the support of his mother. During the period of the claim, that is, from January 18, 1940, to March 28, 1941, plaintiff's contributions were her only source

of income except for the $65 which she received from Denmark in February 1940, and the annual income of $68 realized from her stock. Plaintiff's mother was dependent upon him for her chief support during the entire period of the claim.

6. Plaintiff claims rental and subsistence allowances for an officer of his rank with a dependent mother for the period from January 18, 1940 to March 28, 1941.

Plaintiff presented a claim to the General Accounting Office but it was disallowed.

7. According to a report from the General Accounting Office, increased rental allowances on account of a dependent mother for an officer of plaintiff's rank and length of service for the period January 18, 1940 to March 28, 1941, inclusive, total **$1,248.93.**

The court decided that the plaintiff was entitled to recover, in an opinion *per curiam*, as follows:

The facts in this case are not in dispute and show conclusively that plaintiff's mother was dependent upon him for her chief support. Plaintiff is entitled to recover $1,248.93. It is so ordered.

FRANK B. CROVO, JR., AND AUBREY F. CROVO, CO-PARTNERS, TRADING AS F. B. CROVO, JR. & CO. v. THE UNITED STATES

[No. 45809. Decided December 6, 1943]

On Plaintiffs' Demurrer to Defendant's Amended Plea of Set-off

Fraud under section 1086 of Revised Statutes; alleged misstatement in connection with prior transaction not made for purpose of procuring payment of claim in suit.—"Misstatements" alleged to have been made by plaintiffs in connection with vouchers for goods sold, previously presented by plaintiffs to the Government and duly paid, do not constitute fraud within the contemplation of section 1086 of the Revised Statutes where such alleged "misstatements" were not made for the purpose of securing the payment of the claim in suit but were made, if at all, with reference to another, previous transaction.

Same; recovery limited to extent of pecuniary loss sustained.— Although it is not necessary to show a pecuniary loss to defeat a fraudulent claim, under section 1086 of the Revised Statutes, it is necessary to show such loss when a claim has been paid and an action is brought to recover the amount paid; and in such case recovery can be had only to the extent of the pecuniary loss sustained. *Charles* v. *United States*, 19 C. Cls. 316, distinguished.

Same; necessary to show pecuniary loss in order to sustain plea of set-off.—In order to sustain a plea of set-off for fraud committed in connection with a prior transaction, it is necessary to show a pecuniary loss was sustained by the commission of the fraud.

Mr. J. Bond Smith for the plaintiff. *Mr. L. Q. C. Lamar* was on the briefs.

Mr. Assistant Attorney General Francis M. Shea for the defendant. *Mr. Donald B. MacGuineas* was on the brief.

The facts sufficiently appear from the opinion of the court.

Whitaker, *Judge*, delivered the opinion of the court:

This is a suit by plaintiffs to recover the sum of $1,286.28, the purchase price of vegetables sold the defendant. The defendant filed a plea of set-off alleging that six or seven years previously the plaintiffs had collected money from it on false vouchers, the amount of which it sought to offset against plaintiffs' demand. Plaintiffs filed a demurrer to this plea. The demurrer was sustained. Defendant then filed an amended plea of set-off, to which the plaintiffs have filed a demurrer. The case is now before us on this demurrer.

Defendant's amended plea of set-off differs in no substantial respect from its original one, except that it adds Count II. Except for this addition it would not be again considered.

Count II alleges that from six to nine years prior to the transactions on which plaintiffs now sue they had sold defendant some fruits and vegetables, and that in presenting vouchers therefor they had knowingly "misstated" the particular items sold and the total price of them, and that this had "facilitated" certain defalcations of a Captain Radcliffe. The amount paid plaintiffs on these allegedly false

vouchers, the defendant seeks to offset against plaintiffs' present claim.

There is no allegation that more was paid plaintiffs on the false vouchers than was due, nor is there an allegation that the alleged false statements were made for the purpose of facilitating Captain Radcliffe's alleged defalcations.

Defendant's plea is based upon the provisions of section 1086 of the Revised Statutes (Title 28, U. S. C. sec. 279), which reads:

> Any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance of any claim or of any part of any claim against the United States shall, ipso facto, forfeit the same to the Government; and it shall be the duty of the Court of Claims, in such cases, to find specifically that such fraud was practiced or attempted to be practiced, and thereupon to give judgment that such claim is forfeited to the Government, and that the claimant be forever barred from prosecuting the same.

This section is obviously aimed at fraud committed for the purpose of securing the payment of a claim. Defendant does not allege in its plea that the alleged "misstatements" were made for this purpose. It does not state for what purpose they were made. If not made for the purpose of securing or of furthering the payment of the claim, they do not constitute the fraud condemned by this section.

As stated, the plea does not allege they were made for the purpose of facilitating Captain Radcliffe's defalcations. If they had been, they no doubt would have subjected plaintiffs to criminal prosecution for conspiracy to defraud the United States, but, even so, this would not bring the claim within the provisions of section 1086, since it is not alleged that this was done to aid in the establishment of their claim against the United States.

Furthermore, it is to be doubted whether defendant's plea can be sustained in the absence of a showing of pecuniary loss. At common law, it was necessary, in order to maintain an action of deceit, to show that damage resulted from the deceit. Here there is no such allegation. Nor does

section 1086 provide for an action to recover money paid on a false claim. The only remedy given the Government by this section is the forfeiture of the claim, and in consequence the relief of the Government from liability therefor. After payment there is no claim to be forfeited. It may be the Congress might have provided for a suit against a claimant who had been paid on a false claim, if it had thought of it, but it has not done so.

Although it is not necessary to show a pecuniary loss to defeat a fraudulent claim, it is necessary to do so where a claim has been paid and an action is brought to recover the amount paid. In such case recovery can be had only to the extent of the pecuniary loss sustained. *Charles* v. *United States*, 19 C. Cls. 316, does not hold otherwise. There a pecuniary loss was sustained and the offset was allowed to the extent of it.

The demurrer to defendant's amended plea will be sustained and the plea dismissed. Proof will be taken only on the allegations of plaintiffs' petition. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

On plaintiff's motion for judgment, to which the defendant appended a statement to the effect that it "has no objection to the entry of judgment for plaintiffs in the amount of $1,286.28 other than defendant's set-off", and it appearing that on December 6, 1943, the court sustained the plaintiffs' demurrer to the defendant's amended Plea of Set-off, and dismissed said Plea; and it further appearing that on January 26, 1944, a stipulation was filed, signed by the parties, in which it was agreed that "during the months from November 1941 through August 1942 plaintiffs sold and delivered to defendant, pursuant to purchase orders duly authorized and entered into by representatives of defendant, certain fruits and vegetables for an aggregate purchase price of $1,727.74, of which sum defendant has paid plaintiffs the

sum of $437.66 and defendant was allowed by plaintiffs a credit of $3.80 for returned merchandise," and that "defendant has not paid the balance of said sum, to-wit, $1,286.28"; and it further appearing that on January 28, 1944, the commissioner of the court to whom the case was referred filed a memorandum report in which it was recommended that judgment be entered in favor of plaintiffs in the amount of $1,286.28, it was ordered February 7, 1944, that plaintiffs' motion for judgment be allowed, and judgment was entered for plaintiffs in the said sum of $1,286.28.

ADOLF H. LANDLEY v. THE UNITED STATES

[No. 45860. Decided December 6, 1943]

On Demurrer

Reward for information to Government.—Information gratuitously furnished by plaintiff to certain agencies of the Government does not come within the provisions of any of the statutes providing rewards, and plaintiff's petition does not state a cause of action.
Same; no contract for services.—There was no contract, expressed or implied, made by any Government agency with the plaintiff for any service he may have rendered.

Mr. Adolf H. Landley pro se.
Mr. Percy M. Cox, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The facts sufficiently appear from the opinion of the court.

WHALEY, *Chief Justice*, delivered the opinion of the court.

This case comes to the court on a demurrer to the petition.

Stricken of its surplus verbiage the petition alleges that the plaintiff, acting as a cobroker selling foreclosed mortgaged realty in the City of New York, discovered that numerous mutual savings banks, incorporated under State laws, had been indulging in what he considered certain malpractices in loaning money upon property fictitiously mortgaged; that the depositors of such banks were not adequately protected because the banks were not insured

under Federal laws; that since 1933 he had been attempting to stop these malpractices through the State agencies having jurisdiction of such banks but without success; that he took the matter up with the Federal Government and wrote to the Secretary of the Treasury, the Comptroller of the Currency, the Securities and Exchange Commission, and the Federal Deposit Insurance Corporation and offered suggestions and a plan for the correction of the evils; that he had objected to the Federal Deposit Insurance granting insurance to these companies but three of them had been insured (and in the amendment to the petition plaintiff alleged all other Mutual Savings Banks in the State of New York had been insured); and that he had been informed in effect by the Federal agencies named that his information and observations were very interesting but "unfortunately no statute could be found giving the Federal Government jurisdiction over State banking."

The plaintiff claims that a fair and reasonable value of the information so furnished by him to the Federal Government is the sum of one hundred thousand dollars for which judgment is prayed.

Attached to the petition are four exhibits which are supposed to support plaintiff's claim for remuneration. The Commissioner of the Securities and Exchange Commission replied to plaintiff's letter stating that the Commission had no authority to take any action. The Treasury Department acknowledged receipt of plaintiff's letter and enclosure and stated that it would receive careful consideration in connection with their study of the problem. The Comptroller of Currency simply acknowledged receipt of the letter. The Federal Deposit Insurance Corporation replied that "this corporation is without authority to require that [sic] all mutual savings become insured. As you know all such banks are State chartered institutions. Their affiliation with a Federal agency, consequently, must be voluntary. Insurance of deposits by this Corporation continues to be available to all mutual savings banks."

From the above it will be seen that there has been no

contract, expressed or implied, made with the plaintiff for any service he may have rendered. Such services were purely gratuitous and were voluntarily made. From the allegations in the petition we are unable to see that they were of any value. Certainly no promise was made by any Federal agency to pay plaintiff for his efforts.

Plaintiff's efforts were directed to the improvement of the banking situation in the State of New York and had nothing to do whatsoever with the Federal banking system. Plaintiff labored under the impression, and states in his petition, that he should be treated in the same way as others are treated under statutes covering rewards for information furnished. Plaintiff cites Title 5, Par. 416 of the United States Code which deals solely with rewards for useful suggestions of certain employees of the Navy Department; Title 8, Par. 139, 140, covering reward for informers of labor violations—the transportation and soliciting of transportation or migration of contract laborers from one State to another; Title 50, Par. 58, which covers rewards for useful suggestions of employees of the War Department; and Title 19, Par. 1619, which refers to rewards for information of violations of the Custom Laws.

We know of no law which would justify an award to plaintiff for whatever service he may have rendered and certainly there has been no contract entered into by any Federal agency and plaintiff.

Plaintiff's acts were purely voluntary and such as any good citizen might do in order to protect his Government from assumed violations or bad practices of its agencies.

We are of the opinion that no cause of action has been stated and the demurrer is therefore sustained and the petition dismissed.

It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge,* concur.

JONES, *Judge,* took no part in the decision of this case.

Syllabus

ALLEN POPE v. THE UNITED STATES

[No. 45704. Decided January 3, 1944]*

On the Proofs

Special Jurisdictional Act directing judgment of Court of Claims invalid.—1. Where a case has already been litigated to a final judgment in the Court of Claims, under the court's general jurisdiction; and where the right to seek a review of that judgment in the Supreme Court, also granted by a statute of general application, has already been exercised and such review denied by the Supreme Court; and where the amount of the judgment awarded by the Court of Claims to the plaintiff had been paid to him; it is *held* that a special act of Congress under which the plaintiff seeks to obtain a second, and more favorable, judgment from a court which has already heard, determined and rendered final judgment in the same litigation is invalid and not binding on the Court of Claims.

Same.—2. The special act (56 Stat. 1122) not only purports to confer upon plaintiff the unusual privilege of litigating the same case a second time in a court which once finally decided it, and of applying a second time for a review in the Supreme Court of the United States, which also had once considered plaintiff's petition and denied such a review; but the special act also purports to decide the questions of law which were in the case upon its former trial, and to decide also all questions of fact except certain simple commutations which the Court of Claims is directed by the act to make, according to the formula specified in the special act.

Same; construction of statutes.—3. It is generally recognized that a court should make every proper effort to give to an act of Congress a construction which keeps the act clear of serious constitutional questions.

Same; language of special act mandatory.—4. The language of section 2 of the Special Act under consideration is plain and is, in the court's opinion, mandatory as to how the case must be decided, if the court should take the jurisdiction which the act purports to confer.

Same; decision in Klein case controlling.—5. The decision in *United States* v. *Klein*, (13 Wall. 128) is controlling in the instant case, the grounds of decision in the *Klein* case being the attempted encroachment by one of the three independent branches of the Government upon another branch.

Same.—6. Everything which the Supreme Court said in the *Klein* case, where the suit was pending on appeal in the Supreme Court when

*Plaintiff's petition for writ of certiorari pending.

Syllabus

the act in question was enacted, could be applied with even greater emphasis where several years after the case had been finally adjudicated legislation is enacted to direct the court to hear the case again and to decide it differently.

Same; doctrine in Williams case.—7. While it has not been argued in the instant case that the doctrine laid down by the Supreme Court in the case of *Williams* v. *United States*, 289 U. S. 555, has any important bearing upon the question presented in the instant case, nevertheless the language of the Supreme Court in the *Williams* case, and the fact that the language was uttered in the course of a decision of a case certified to the Supreme Court by the Court of Claims, would seem to leave no room for doubt that the Court of Claims is a court in fact as well as in name, and that its decisions are judicial decisions.

Same; review of Court of Claims decisions by Supreme Court.—8. If the Court of Claims were not a court the Supreme Court would not review its decisions, as it does, and as it has done since the amendment, in 1866, (14 Stat. 9) of the statute defining the jurisdiction and powers of the Court of Claims (*United States* v. *Jones*, 119 U. S. 477).

Same; Court of Claims not an agent of the Legislature.—9. When the Court of Claims decides its cases in the first instance the court is no more acting as a mere agent or arm of the Legislature than is the Supreme Court when it, under the appelate procedure prescribed in the statute, decides them finally (U. S. Code, Title 28, section 288).

Same; the Congressional mandate and the Supreme Court.—10. If the Congressional mandate contained in section 2 of the Special Act under consideration is valid and should be followed by the Court of Claims, it would equally, if would seem, be binding upon the Supreme Court upon certiorari, also provided for under section 4 of the same act.

Same; constitutionality of an act granting new trial; the Pocono Pines case.—11. In the case of *Pocono Pines Assembly Hotels Co.* v. *United States*, 73 C. Cls. 447, all members of the court were of the opinion that an act which merely granted a new trial would be unconstitutional if its effect was to deprive a claimant against the United States of a judgment which he had recovered, though the members of the court differed in their views as to whether the act there in question did grant a new trial.

Same; act of Congress directing the Court of Claims to retry a case.—12. An act directing the court to retry the issues of a case, which issues were or should have been tried the first time, would, regardless of whether the Government or the plaintiff sought the new trial, be no less dangerous to the independence of the court as a judicial body than a direction to the court by the Congress as to how the court must decide a pending or previously adjudicated case.

Mr. Herman J. Galloway and *Mr. George R. Shields* for the plaintiff.

Mr. Assistant Attorney General Francis M. Shea for the defendant. *Mr. Philip Mechem* was on the brief.

The facts sufficiently appear from the opinion of the court.

MADDEN, *Judge*, delivered the opinion of the court:

This suit is here by virtue of a special act of Congress, the text of which is quoted later in this opinion. The facts preceding the enactment of the special act were as follows:

The plaintiff made a contract with the Government dated December 3, 1924, to construct a tunnel for the supply of water for the District of Columbia. The work was completed in 1927. The plaintiff claimed that the Government had in various ways breached the contract and he brought a suit (K-366) in this court, asking for damages in the sum of $306,825.33. The case was tried and the court rendered a judgment for the plaintiff for $45,174.46, accompanied by an opinion which dealt with the issues in the case (76 C. Cls. 64). The plaintiff made several motions for new trials, which were denied. Written opinions accompanied two of the denials (81 C. Cls. 658; 86 C. Cls. 18). The plaintiff petitioned the Supreme Court of the United States for a writ of certiorari to review this court's decision. The Supreme Court denied the petition (303 U. S. 654). All of the foregoing steps in the litigation were taken under the general legislation conferring jurisdiction on this court, subject to review by the Supreme Court (28 U. S. C. §§ 250, 288). The amount of the judgment rendered by this court in favor of the plaintiff was paid to him.

In 1942 the plaintiff secured the passage of the special act of Congress under which this suit is brought. The text of the act (56 Stat. 1122) is as follows:

AN ACT

To confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction be, and the same is hereby,

conferred upon the Court of Claims of the United States, notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allowance, to hear, determine, and render judgment upon the claims of Allen Pope, his heirs, or personal representatives, against the United States, as described and in the manner set out in section 2 hereof, which claims arise out of the construction by him of a tunnel for the second high service of the water supply in the District of Columbia.

Sec. 2. The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely, for the excavation and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer, whereby the plans for the work were so changed as to lower the upper "B" or "pay" line three inches, and as to omit the timber lagging from the side walls of the tunnel; and for the work of excavating materials which caved in over the tunnel arch and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing.

Sec. 3. Any suit brought under the provisions of this Act shall be instituted within one year from the date of the approval hereof, and the court shall consider as evidence in such suit any or all evidence heretofore taken by either party in the case of Allen Pope against the United States, numbered K-366, in the Court of Claims, together with any additional evidence which may be taken.

Sec. 4. From any decision or judgment rendered in any suit presented under the authority of this Act, a writ of certiorari to the Supreme Court of the United States may be applied for by either party thereto, as is provided by law in other cases.

Approved, February 27, 1942.

It is apparent that the suit which is now before us has already been litigated to a final judgment in this court, un-

der the court's general jurisdiction, and the right to seek a review of the judgment in the Supreme Court, which is also granted by a statute of general application, has already been exercised and the review denied. The plaintiff seeks to justify his attempt to obtain a second and more favorable judgment from a court which has already heard, determined, and rendered final judgment in the same litigation, by pointing to the special act.

The history recited above presents a problem as to the power of Congress, under the Constitution, to do what the special act attempts to do. The text of the special act is quoted above. A rereading of Section 2 of the act will show that the task which the court is directed to perform is a small and unimportant one. It is directed to refer to its previous findings, take certain cubic measurements and certain numbers of bags of cement which are recited there by reference, multiply those figures by the several unit prices stipulated in the contract for the several kinds of work, add the results, and render judgment for the plaintiff for the sum. If this reading of Section 2 is correct, not only does the special act purport to confer upon the plaintiff the unusual privilege of litigating the same case a second time in a court which once finally decided it, and applying a second time for a review in the Supreme Court of the United States, which once considered and denied such a review. The special act also purports to decide the questions of law which were in the case upon its former trial and would, but for the act, be in it now, and to decide all questions of fact except certain simple computations. Thus a second serious question as to the Constitutional power of Congress is presented.

The Government urges that we avoid the constitutional issue by construing the act to mean only that a new trial is granted to the plaintiff by the act, in which new trial the court will be free to decide, in the usual manner of a court, the questions of law and fact involved in the case. Counsel for the plaintiff, though in their original brief they said, as to one item of the claim "The Act appears mandatory that such cost be now allowed," and expressed, though less peremptorily, a similar view as to other items, seemed to take the position at the oral argument and in their final brief that

the court could, under the act, exercise a considerable power of decision if it would take jurisdiction of the case.

While we recognize that a court should make every proper effort to give to a statute a construction which keeps it clear of serious constitutional questions, we are unable to so construe the special act. We think that the language of Section 2 is plain, and is, as the plaintiff originally contended, mandatory as to how the case must be decided if the court undertakes the jurisdiction which the act purports to confer. We are not willing to distort the plain meaning of language, for the purpose of evading a troublesome question. We therefore undertake the question as to whether Congress can effectively direct this court to again decide this case, which it has once finally decided under its general jurisdiction, and to decide it for the plaintiff, and give him a judgment for an amount which simple computation based upon data referred to in the special act, will produce.

We refer first to *United States* v. *Klein*, 13 Wall. 128. Under a general statute of 1863 and Presidential proclamations issued pursuant thereto, Klein, by virtue of his oath of allegiance and a resulting Presidential pardon, was entitled to sue in this court for property captured by the Union Army during the Civil War. He did so sue and recovered a judgment. The Government appealed the case to the Supreme Court. While the appeal was pending, Congress in 1870 passed an act providing that no pardon should be admissible to establish any claim against the United States, and that when any pardon had been granted to a person suing under the act of 1863, which pardon recited that the recipient "took part in the late rebellion" and which pardon had been accepted in writing without express disclaimer, by the recipient, of guilt, the pardon should be conclusive evidence "that such person did take part in * * * the late rebellion" and upon proof of the pardon and the acceptance of it the jurisdiction of the court should cease and the court should forthwith dismiss the suit.

The Government urged that the Supreme Court should dismiss the suit. Instead, that court affirmed the judgment of this court and held the 1870 Statute unconstitutional. The opinion, delivered by Chief Justice Chase, said:

It is evident from this statement that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.

It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.

The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it?

We think not; * * *

The Chief Justice also said:

We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.

It is of vital importance that these powers be kept distinct. The constitution provides that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress shall from time to time ordain and establish. The same instrument, in the last clause of the same article, provides that in all cases other than those of original jurisdiction, "the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse

to the government and favorable to the suitor? This question seems to us to answer itself.

We think that the Supreme Court's decision in the *Klein* case is applicable to and decisive of the question before us. The fact that in the *Klein* case the statute attempted to take away a right of recovery from the person who was suing the Government, while in our case the statute attempts to confer a right of recovery upon such a person, must be immaterial. The ground of decision in the *Klein* case was the attempted encroachment, by one of the three independent branches of the Government, upon another; the effort of Congress to decide a law suit while it was pending in a court. The fact that in the *Klein* case the statute was enacted while the case was still pending on appeal in the Supreme Court, while in the instant case the statute was enacted some years after the case had been finally adjudicated, cannot be a basis of distinguishing the cases. Everything which the Supreme Court said in the *Klein* case, in which the suit was a pending one, could be applied with even greater emphasis to a legislative direction to a court which has already heard and decided a case, to hear it again and decide it differently.

While counsel for the plaintiff have not seriously urged that the doctrine laid down in the case of *Williams* v. *United States*, 289 U. S. 553, has any important bearing upon the question here presented, we nevertheless give brief attention to that question. In that case the Supreme Court held that this court was a legislative court, not created under the provisions of Article III of the Constitution of the United States, and that therefore the salaries of its judges could be reduced during their tenures of office. The Supreme Court said (p. 561):

> It is a court of great importance, dealing with claims against the United States, which, in the aggregate, amount to a vast sum every year. The questions which it considers call for the exercise of a high order of intelligence, learning and ability. The preservation of its independence is a matter of public concern. The sole function of the court being to decide between the government and private suitors, a condition, on the part of the judges, of entire dependence upon the legislative pleasure for the tenure of their offices and for a con-

tinuance of adequate compensation during their service in office, to say the least, is not desirable.

But these considerations, though obvious enough, are not sufficient, standing alone, to support a conclusion that the Court of Claims comes within the reach of the judicial article in respect of tenure of office and compensation. The integrity of such a conclusion must rest not upon its desirability, but upon its conformity with the provisions of the Constitution.

We do not attempt to explain the decision in the *Williams* case, because, and we say it with deference, we do not pretend to understand it.[1] In any event, the language of the Supreme Court in the *Williams* case, and the fact that that language was uttered in the course of the decision of a case certified to the Supreme Court by this court, would seem to leave no room for doubt that this court is a court, in fact as well as in name, and that its decisions are judicial decisions. If it were not, the Supreme Court would not review its decisions,[2] as it does, and has done since the amendment, in 1866, 14 Stat. 9, of the statute defining the jurisdiction and powers of this court. *United States* v. *Jones*, 119 U. S. 477. And we would suppose, unless the decision in the *Williams* case means the contrary, that we are no more acting as a mere agent or arm of the legislature, when we decide our cases in the first instance, than is the Supreme Court, when it, under the appellate procedure prescribed in the statute,[3] decides them finally. Each court is assigned its place in the process of doing justice between the United States and those who have claims against it. That is the major portion of this court's assignment. It is only a small part of the Supreme Court's assignment. But one, when it is performing that assignment must be acting judicially, if the other is.

The special act here in question provides, in Section 4, that from this court's decision, a writ of certiorari may be

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[1] Compare *U. S.* v. *Klein*, 13 Wall 128, 144–145; *U. S.* v. *Union Pacific R. R.* 98 U. S. 569, 603; *Miles* v. *Graham*, 268 U. S. 501. But see *Ex parte Bakelite Corporation*, 279 U. S. 438.

[2] *Hayburn's* Case, 2 Dall. 409; *Gordon* v. *U. S.*, 117 U. S. 697 (see the opinion of Chief Justice Taney in *Gordon's* case, printed in 117 U. S. 697); *B. and O. R. R.* v. *Interstate Commerce Commission*, 215 U. S. 216.

[3] 43 Stat. 939, 28 U. S. C. § 288.

applied for in the Supreme Court, as in other cases. But if the Congressional mandate of Section 2, which directs this court how to decide the case, is valid, and is followed by this court, it would equally, it would seem, be binding upon the Supreme Court. There would be little chance of error, since only mathematical computation is left to the court, hence the provision for certiorari in Section 4 is perhaps not important.

Perhaps we have discussed the question presented by this case as if it were a dry question of constitutional theory. It is not. It is a question of whether this court, which has for some eighty years been entrusted with the responsible and dignified function of doing justice between the United States and those who bring suit against it, is going to be permitted to perform that function with the independence and single-mindedness to justice which the task deserves. It is a question of whether the judges of this court may continue to decide their cases as their consciences, and such acumen as they have, may lead them to decide, with the confidence that their decisions will be reviewed in the traditional judicial way, with both sides of the controversy presented to the reviewing tribunal; or must, on the other hand, feel that they must weigh in the scales the ability, energy, and persistence of the parties to the suit and their counsel, since they may, in a naturally completely partisan effort, obtain a hearing before a committee of Congress, at which hearing the other side of the controversy is not presented, and secure legislation setting aside the judgment of the court and directing the court to put its indorsement upon the judgment of members of another branch of the Government.

This court is, of course, as prone to error as any other. Its decisions are, as are those of other courts, sometimes erroneous, and sometimes unjust. A litigant in any court is subject to such a hazard. But the unusual procedure followed in this case is still more hazardous, as may be shown by considering just one of the items of plaintiff's claim. Item 2 of his claim, as summarized in paragraph VI of his petition is for

2. Excavation of materials which caved in over the tunnel arch, 4,781 cubic yards at $17.00 $81,277.00

By section 2 of the special act, this court is, in effect, directed to render a judgment for that amount. Yet we venture to say that no court, left free to decide the question according to law and justice would decide that the plaintiff should recover one dollar upon that claim. The relevant facts are that, in the process of excavating the tunnel, large amounts of earth and rocks caved in from the roof of the tunnel. These cave-ins occurred through no effort of the plaintiff, and, he claims, in spite of his efforts to prevent them. On the former trial of the case in this court, the plaintiff himself testified that:

> The specifications described the B line as being the outside limiting line for which payment for excavation will be made. If any excavation is made outside that line, either by mistake or by the ground caving in, no payment is made beyond that line. That line is the limiting line for pay.

He further testified that the Government's contracting officer had said he "hoped to find some other method of filling that space over the rock section that would be less expensive than filling it with dry pack and grout" but that plaintiff protested against this because:

> The manner provided in the contract for reimbursing me for hauling out of the tunnel whatever rock or earth fell into it was covered in the compensation allowed me for dry packing and grout.

He further testified, with reference to a ruling (later rescinded) by the contracting officer that no grout should be put in the dry packing in the rock sections, that he complained to the contracting officer that such a ruling would cause him loss because, he testified,

> All this preparatory work that I had done would not be paid for; that is, I was paid for no excavation that fell down above the "B" line, all this earth that fell down I was not paid for it under the item of excavation. The only way I would get paid for removing that earth that fell down was when I refilled it with dry packing and grout and my price for grout included the cost of removing that earth from the tunnel.

On his cross-examination the questions and answers relating to the same matter were as follows:

625. X Q. You said in your testimony that the only way for you to get paid for the earth which you took out, the excess earth above the B line, was to grout with stones.

A. Yes, sir.

627. X Q. And you were being paid $3 a bag for cement used in grouting and that cement cost you 80 cents, didn't it?

A. The cement alone cost that, but there were other materials. The cement was only a guide, a measure. There was the sand and there was labor, and equipment to put it in, and besides that, that was computed to pay for the cost of the earth, removing the earth that fell in.

628. X Q. Certainly; so that you expected to make enough profit out of the grouting to pay for the falling of the earth; isn't that what you said?

A. No, sir; I expected to be paid. I expected payment for the grout would pay for the earth that fell in, removing the earth.

629. X Q. It would pay?

A. Yes.

630. X Q. In other words, the grout pay would pay you for the labor of removing the excess earth; isn't that what you mean?

A. That is exactly what I have been trying to show for five years.

Plaintiff now presents to the court a congressional direction to give him, in addition to pay for all the dry packing and grouting which he claims he did, and which, as measured would fill the space left vacant by the earth and rocks that fell into the tunnel, more than $80,000, one-half of the whole amount which the court is directed to pay him, for work for which, by his own construction of the contract, he was entitled to no pay at all, except the pay for dry packing and grouting.

We think that, in a judicial proceeding with both sides represented, a plaintiff would hardly ever recover a judgment for $80,000 upon a claim which had no basis whatever. And we think we should not be directed to indorse that kind of a judgment, arrived at by members of another branch of the Government. Each branch of the Government will, inevitably, make mistakes, but each should take, and keep, the responsibility for the mistakes it makes.

Under the decision of the Supreme Court in the *Williams* case, *supra*, the tenures and salaries of the Judges of this court are at the will of Congress. We would be much less than worthy of the trust which has been reposed in this court since the year 1863[4] if we should also subject our decisions to the will of Congress.

In the view which we have taken of Section 2 of the special act, it is not necessary for us to decide, and we do not decide, whether an act which merely granted a new trial, without directing the court how to decide the case upon the new trial, would or would not be an infringement upon the judicial powers of the court.[5] In the case of *Pocono Pines Assembly Hotels Co.* v. *United States*, 73 C. Cls. 447, all members of the court were of the opinion that such an act would be unconstitutional if its effect was to deprive a claimant against the United States of a judgment which he had recovered, though they differed in their views as to whether the act there in question did grant a new trial. We think that an act directing the court to re-try the issues of a case, which issues were or should have been tried the first time would, regardless of whether the Government or the plaintiff sought the new trial, be no less dangerous to the independence of the court as a judicial body, than a direction to the court as to how it must decide a pending or previously adjudicated case. It likewise would require the court, when it was first deciding the case, to keep its mind, not solely on the law and the facts of the case, but also on the question of how its decision would look to the members of another branch of the Government,

[4] Act of March 3, 1863; 12 Stat. 765. President Lincoln in a message to Congress on December 3, 1861, said:

"It is important that some more convenient means should be provided, if possible, for the adjustment of claims against the Government, especially in view of their increased number by reason of the war. It is as much the duty of Government to render prompt justice against itself in favor of its citizens as it is to administer the same between private individuals. The investigation and adjudication of claims in their nature belong to the judicial department. Besides, it is apparent that the attention of Congress will be more than usually engaged for some time to come with great national questions. It was intended by the organization of the Court of Claims mainly to remove this branch of business from the halls of Congress; but while the court has proved to be an effective and valuable means of investigation, it in great degree fails to effect the object of its creation for want of power to make its judgments final."

The act of 1863 referred to at the beginning of this note was the result of this message.

[5] See *Cherokee Indians* v. *United States*, 270 U. S. 476, 486.

when presented to them in partisan fashion without the safeguards which accompany judicial review.

What we have said is said with the complete respect which is properly due the legislative branch of the Government. We have no feeling that there is involved in this case any intentional effort to infringe upon the proper exercise by this court of its assigned duties in our scheme of government. The Congress has its problems, difficult and pressing. From the very nature of our work, we have opportunities for deliberate consideration of particular cases, which, as we understand, Congress has not. We desire only to be permitted to act as a court.

It follows from what we have said that the plaintiff's petition must be dismissed.

It is so ordered.

WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

LITTLETON, *Judge*, dissenting: I cannot concur in the opinion of the majority dismissing the petition for lack of jurisdiction to consider it notwithstanding the Special Jurisdictional Act of February 27, 1942. I do not construe the special act as in any way infringing upon the Judicial Department of the Government or upon the proper exercise by the court of its judicial duties. On the contrary, I construe the act as an authorization by the lawmaking Departments of the Government to the court to consider plaintiff's claims in the light of the waivers by the Legislative and Executive Departments of the Government of limitations, *res adjudicata*, and certain rights and defenses of the Government, mentioned in Sections 1 and 2 of the act, which the Government, as the defendant in the suit, might otherwise bring forward and successfully insist upon in opposition to the jurisdiction of the court and the right of plaintiff to make and maintain the claims. I do not think Congress intended to go, and I do not find anything in the special jurisdictional act which goes, beyond this. Section 1 of the act is a grant of jurisdiction and authority to hear, determine, and enter judgment notwithstanding certain defenses mentioned there-

in, including the waivers of defenses which might otherwise be made, as more specifically described in Section 2 of the act. No special significance should be attached to the word "directed" appearing in the first clause of Section 2. Section 1 conferred the jurisdiction and authority to be exercised by the court and section 2 simply described in detail the basis of the liability which the Government, acting through the Legislative and Executive Departments, was willing to assume in the circumstances, and by this section 2 the Government consented to be charged on the basis specified in accordance with such findings and such measurements as the court shall make in accordance with the jurisdiction and authority conferred by section 1.

I think it is clear that Congress by an act approved by the President may do this without in any way interfering with the proper judicial function of the court although the reason of Congress in so doing is purely moral or equitable rather than legal, and, notwithstanding the plaintiff has once lost his case in this court in a suit under the contract. It seems to me that the Sovereign, which acts through its Legislative and Executive branches in respect of the institution of suits against it and through the Judicial branch in the determination and adjudication of claims against it, in such suits, is not exactly in the same situation as a private litigant might be in regard to the matter of assuming a liability, or liabilities, on a specified basis and authorizing and empowering this court to adjudicate and determine such assumed liabilities in a second suit. The provisions of the Special Act of February 27, 1942, now form the legal basis for the adjudication of the claims presented in the petition filed thereunder. *Alcock* v. *United States*, 74 C. Cls. 308. See, also, *Cherokee Nation* v. *United States*, 270 U. S. 476, 486. I do not think the case of *United States* v. *Klein*, 13 Wall. 128, is in point here.

For the reason stated I think the court has jurisdiction and authority in the premises and should proceed to hear, determine, and enter judgment under the provisions of the jurisdictional act and upon the record in the case.

JONES, *Judge*, took no part in the decision of this case.

HISTORY OF THE ISSUE

The Reporter's history of the issue:

The original petition in the case of *Allen Pope* v. *The United States*, No. K–366, asking for damages in the amount of $306,825.33, was filed August 23, 1929.

After hearing and report of a commissioner of the court, and after trial of the case, an opinion by Chief Justice Booth was rendered March 7, 1932, awarding the plaintiff a judgment for $45,174.46. Plaintiff's motion for a new trial was overruled June 5, 1933. Reported 76 C. Cls. 64.

Leave to file a second motion for a new trial was denied August 15, 1933.

On a third motion for a new trial, an opinion *per curiam*, overruling the motion, was filed June 10, 1935. Reported 81 C. Cls. 658.

Judgment for $45,174.46 was paid July 15, 1935. (Treasury Warrant No. 575.)

Plaintiff's motion for leave to file motion for amendment of record of judgment was filed October 14, 1935, and was overruled October 24, 1935, on the ground that the court was without jurisdiction.

Plaintiff's second motion for leave to file motion for amendment of record of judgment was filed November 4, 1935, and overruled January 6, 1936.

Plaintiff's motion for leave to file a fourth motion for a new trial, or alternatively, motion for new trial, was filed September 27, 1937, and allowed November 16, 1937.

On the fourth motion for a new trial, an opinion, *per curiam*, overruling the motion, was filed December 6, 1937. Reported 86 C. Cls. 18.

Plaintiff's petition for writ of certiorari was denied by the Supreme Court March 28, 1938. Reported 303 U. S. 654.

The Special Jurisdictional Act (H. R. 4179), under the provisions of which the issues are presented in the instant case (No. 45704), was approved February 27, 1942; 56 Stat. 1122.

Under the special act, plaintiff's petition in the instant case was filed July 7, 1942, the amount claimed being $162,616.80.

The case was referred to a commissioner of the court, whose report was filed March 3, 1943, the record in the prior case, No. K–366, being transferred to the instant case, and other evidence being presented.

Upon the report of the commissioner and the briefs of the parties the case was argued before the court on December 8, 1943.

On January 3, 1944, the decision of the court was rendered, as set forth above.

The plaintiff in case No. K–366 sued on a contract entered into December 3, 1924, for the construction of a tunnel designed to carry water for the District of Columbia. In that suit the plaintiff was given judgment for $45,174.46, as above stated. This judgment consisted of: (1) an item of $13,290.22, representing the expense of substitution ordered by the contracting officer in method but not authorized by the contract; (2) an item of $2,500 for timber used by the contractor and authorized by the contract; (3) an item of $231.54 for concrete actually placed and authorized by the contract to be placed; (4) an item of $500 earned, withheld and wrongfully retained for indemnification; (5) items aggregating $17,427.70 for excess work due to defendant's erroneous lines and grades, including 723 cubic yards of material caved-in over the arch of the rock sections of the tunnel, and hereinafter to be referred to; (6) and an item of $11,225, damages for delay due to interference.

Section V (1) of the petition in the instant case claims (a) $969, excavation of caved-in material, 57 cubic yards at $17 between an original contract line, known as the "B" line, and the "B" line as lowered three inches by the contracting officer; (b) $4,879, for excavation of 287 cubic yards of cave-ins at $17, due to omission of sidewall lagging; and (c) $4,879, for filling the 287 cubic yards of caved-in spaces at $17, a total of $10,727. This claim of $10,727 was made in Section XII of plaintiff's petition in case No. K–366. The court's finding made relative thereto is No. XI. Recovery was denied.

Section V (2) of the petition in the instant case claims $81,277 for excavation of 4,781 cubic yards of material at $17,

caved-in over the tunnel arch. The petition sets forth the total cubic yardage of such material as 5,561 cubic yards, and excludes therefrom (a) 57 cubic yards claimed as above in Section V (2) of this petition, and (b) 723 cubic yards allowed for by the court, Finding X in case No. K–366, and mentioned hereinabove. There was no claim in the original petition in case No. K–366 for the excavation as such of this 4,781 cubic yards, but there was therein a claim for grouting and dry packing the space voided by the 5,561 cubic yards of caved-in material. See Section IV and V of the original petition, case No. K–366. For dry packing in this area and grouting see the court's findings in case No. K–366, Findings III and IV, on which the court made no allowance.

Section V (3) of the petition in the instant suit makes claim to $14,240.70, which plaintiff says remains unpaid, for dry-packing the 5,561 cubic yards mentioned above (Section V (2) of the instant petition), being a balance of 4,746.9 cubic yards of dry packing at $3 per cubic yard, plaintiff having been paid for 814.1 cubic yards only on the contracting officer's estimate. This item is substantially Section V of the original petition. See the court's findings in case No. K–366, Findings III, IV, and VI. This item was not allowed in the judgment.

Section V (4) of the petition in the instant suit lays claim to $56,362.10 as compensation for 18,790.7 bags of cement at $3.00 per bag. The correct extension is $56,372.10. This is a claim for grouting, embodied in Section IV of the original petition, and embraced in the court's findings in case No. K–366, Nos. III and VI, there indicated as consisting of 13,891 bags of cement pumped in grout into cavities in the timbered sections, not paid for, and 4,899.7 bags of cement used in grout poured into cavities in the rock section, the item of 4,899.7 bags being 9,032 bags consumed less a limit of 4,132.3 bags paid for. The court did not include this item in its judgment of recovery.

The total number of bags of cement used in grouting, 22,923 bags, being the aggregate of 13,891 bags and 9,032 bags, converted by the liquid method described in the opinion of the court, 76 C. Cls. 85, using 40 per cent of the dry-packed area as void, and one bag of cement to 2.62 cubic feet of

grout, represents 5,561 cubic yards of space dry packed and grouted.

Unit prices named in the contract were: for excavating $17 per cubic yard, for dry packing $3 per cubic yard, and for grouting $3 per bag.

The court held in the instant case, as hereinabove stated, that the petition of plaintiff must be dismissed. The court made no findings of fact.

CHRISTOPHER J. MOGAN v. THE UNITED STATES

[No. 45647. Decided April 5, 1943]

On the Proofs

Pay and allowances; bachelor officer in Medical Corps, U. S. A., with dependent mother.—It is *held* that plaintiff, a bachelor officer in the Medical Corps, U. S. A., is entitled to recover increased rental and subsistence allowances for an officer of his rank and length of service, where it is undisputed that plaintiff's mother was in fact dependent upon him for her chief support.

The Reporter's statement of the case:

Mr. Mahlon C. Masterson, for the plaintiff. *Ansell, Ansell & Marshall* were on the brief.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff, Christopher J. Mogan, accepted an appointment as First Lieutenant, Medical Corps Reserve, on October 19, 1934; was promoted to Captain, Medical Corps Reserve, on October 25, 1938, and promoted to Major, United States Army, February 1, 1942, in which rank he is now serving and has so served continuously since that date.

Plaintiff had the following periods of active duty: from June 26, 1935, to July 16, 1939; July 21, 1940, to August 3, 1940, and from October 8, 1940, since which date his service in the Army has been continuous. His record of duty is set forth in defendant's Exhibit 1, which is made a part of this finding by reference.

2. Plaintiff's father, Christopher J. Mogan, died on April 17, 1927. He left a will, naming plaintiff's mother as sole beneficiary. At the time of his death he owned jointly with plaintiff's mother a house in Glassport, Pennsylvania, and another in Charleroi, Pennsylvania, purchased in 1907 and 1911, respectively. Both houses were sold in 1936 or 1937 to satisfy a mortgage.

Plaintiff's father left his mother some stocks and bonds at the time of his death, all of which were lost in 1936 and 1937 as a result of poor investments.

3. Plaintiff's mother, Mary F. Mogan, is 64 years of age. She did not remarry after the death of the plaintiff's father. She has one son, William J. Mogan, besides the plaintiff, and two daughters. Her son William has not contributed anything to the support of his mother since his marriage in 1939, and her daughters did not at any time contribute to her support.

4. Since October 8, 1940, the commencement of plaintiff's claim, his mother has owned no property, real or personal, and has had no income other than that contributed to her by the plaintiff.

Plaintiff has been the sole support of his mother during the entire period of his claim. He has paid all of her household and living expenses and given her about $60 a month to spend as she saw fit.

5. During the period from October 8, 1940, to December 5, 1940, plaintiff occupied with two other officers a tent which was furnished by the Government. From December 6, 1940, to June 9, 1941, he occupied one room ten feet square furnished with a bed only in a temporary building at Fort George G. Mead, Maryland.

On June 9, 1941, plaintiff was transferred to the hospital at Fort Meade. On June 13, 1941, he occupied room 22 in Building TO–85, bachelor officers' quarters. On June 23, 1941, he was officially notified that these quarters were assigned to him effective June 13, 1941. Plaintiff's mother never occupied quarters in Building TO–85 with plaintiff during any period he was assigned to duty at the hospital at Fort Meade. The quarters assigned to plaintiff at

Fort Meade were not suitable for the occupancy of his mother. While assigned to duty at the hospital plaintiff was not required to remain on the Post, and from June 9, 1941, to July 31, 1942, he and his mother occupied private quarters which he rented at his own expense.

6. Plaintiff has never been paid any rental allowance or any subsistence allowance on account of a dependent for any part of the period of his claim. Plaintiff's mother did not occupy Government quarters at any time. Plaintiff is not married.

7. Plaintiff claims from the United States increased rental and subsistence allowances as provided by law for an officer of his rank and length of service with dependents, from October 8, 1940, to the date judgment is rendered herein.

8. Plaintiff submitted a claim for increased rental and subsistence allowances, as an officer with a dependent, but the claim was denied by the Comptroller General on the ground that the evidence submitted did not establish his right thereto under the statute.

9. The claim is a continuing one and is subject to computation by the General Accounting Office.

The court decided, in an opinion *per curiam*, as follows, that the plaintiff was entitled to recover:

The facts in this case are not in dispute. Plaintiff's mother is in fact dependent upon him for her chief support. Plaintiff is entitled to recover rental and subsistence allowances due an officer of his rank and length of service, with a dependent, from October 8, 1940. Entry of judgment will be suspended pending the filing of a report by the General Accounting Office showing the amount due under the foregoing findings and in accordance with this opinion. *Donald K. Mumma* v. *United States*, decided February 1, 1943, 99 C. Cls. 261.

In accordance with the above opinion and upon a report from the General Accounting Office showing the amount due thereunder to be $3,017.53, judgment for the plaintiff was entered February 7, 1944, in the sum of $3,017.53.

KELLEY'S CREEK AND NORTHWESTERN RAILROAD COMPANY, A WEST VIRGINIA CORPORATION, AND KELLEY'S CREEK COLLIERY COMPANY, A WEST VIRGINIA CORPORATION, v. THE UNITED STATES

[No. 44631. Decided October 4, 1943. Defendant's motion for new trial granted and opinion modified February 7, 1944]

On the Proofs

Eminent domain; liability for river improvements in aid of navigation.—The Government has the right to take such measures as to it may seem proper for the improvement of navigation without liability for injury to property except that located above ordinary high watermark. *Marret, Admr. et al.* v. *United States*, 82 C. Cls. 1, 13: 299 U. S. 545, cited.

Same; high watermark; definition of.—The high watermark is the line where the water stands sufficiently long to destroy vegetation below it; it is not to be determined by arithmetical calculation but is a physical fact to be determined by inspection of the river bank. *Union Sand & Gravel Co.* v. *Northcott, et al.*, 102 W. Va., 519; 135 S. E. 592, cited.

Same; only damages as result of a "taking" recoverable.—Only damages which accrue as the result of a taking can be recovered in a suit against the Government growing out of improvement of river navigation. *United States* v. *Grizzard*, 219 U. S. 180, 183.

Same; law of West Virginia as to riparian rights. Under the law of West Virginia a riparian owner on a navigable stream owns the land to low watermark; the title to the bed of the stream beyond low watermark is in the State but the title to the bed of the stream up to ordinary high watermark is subject to a paramount servitude in favor of the United States authorizing it to take all necessary and proper steps in the interest of navigation. *Brown Oil Co.* v. *Caldwell*, 35 W. Va. 95; 13 S. E. 43; *Gibson* v. *United States*, 166 U. S. 269, 272, and similar cases cited.

Same; structure erected in bed of stream at owner's peril.—Any structure erected in the bed of the stream is erected there at the peril of him who erects it, and with the knowledge, actual or constructive, that the Government in the improvement of navigation may so raise the high watermark as to destroy or impair the utility of the structure. *Hood* v. *United States*, 49 C. Cls. 669, and other cases cited.

Same; Chicago, Milwaukee, St. Paul & Pacific Railroad Company decision controlling in instant case.—The decision of the Supreme Court in *United States* v. *Chicago, Milwaukee, St. Paul & Pacific*

Railroad Company, 312 U. S. 592 (overruling *United States* v. *Lynah*, 188 U. S. 445), holding the United States is not liable for damages to a railroad embankment whose base was in the bed of the stream, is controlling in the instant case, where a colliery company had located a tipple and ice breaker in the bed of a navigable stream under license from the Secretary of War.

The Reporter's statement of the case:

Mr. Albert C. Hirsch for the plaintiff. *Messrs. Ralph H. Demmler* and *Hirsch & Shumaker* were on the brief.

Mr. P. M. Cox, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiffs, Kelley's Creek and Northwestern Railroad Company and Kelley's Creek Colliery Company, are West Virginia corporations, and were so at the various times complained of in the petition herein.

2. There are 1,000 shares of stock of Kelley's Creek and Northwestern Railroad Company, and of these shares 995 are held by Kelley's Creek Colliery Company, the remaining five shares being issued to qualify directors. Hereinafter Kelley's Creek and Northwestern Railroad Company is referred to as the "railroad company," and Kelley's Creek Colliery Company as the "colliery company."

3. The colliery company is, and was during the times herein involved, owner and holder of a leasehold estate for 50 years from April 1, 1903, whereby it has the right to mine and carry away coal lying under a certain tract of approximately 8,000 acres in Kanawha County, West Virginia, lying along Kelley's Creek, a tributary of the Kanawha River.

The railroad company is, and was during the times herein involved, owner and holder of a leasehold estate for 50 years from April 1, 1903, of 4.016 acres situated near the mouth of Kelley's Creek, together with terminal and moorage rights above and below the said 4.016 acres.

The four-acre tract with moorage and terminal rights was used in connection with mining operations on the 8,000-acre tract, the colliery company doing the mining and the rail-

road company the transporting of the coal from mine to tipple at the river's edge, through the four-acre tract.

4. On August 11, 1903, the Secretary of War, on application, gave permission to the colliery company to construct and maintain a coal tipple and ice breaker on the north bank of the Kanawha River just below the mouth of Kelley's Creek, according to exhibited plans, upon the condition that the work permitted to be done should be subject to the supervision and approval of the engineer officer of the United States Army in charge of the locality; that if at any time in the future it should be made to appear to the Secretary of War that the authorized structures were unreasonable obstructions to free navigation, the licensee would be required to remove or alter the same so as to render navigation reasonably free, easy, and unobstructed; and that the license simply gave permission to do the work authorized but did not give any property rights.

The coal tipple and ice breaker were constructed in due course under this license and were operated in connection with the mining of coal and the transportation thereof until the year 1934, and the license was never revoked. No notice was given that the structures interfered with navigation, and plaintiffs were never notified to remove them.

The Kanawha River is and has been at all times here material a navigable stream.

5. The tipple projected over the water and in operation the coal transported to the tipple was conveyed from the car by a belt conveyor system out over the waiting barge under the tipple and deposited thereon through a movable loading boom. The minimum height of the tipple depended on the level of the river since there had to be sufficient clearance under the tipple to accommodate the barge.

The original tipple as modified from time to time by necessities of maintenance was a wooden structure and satisfactorily served its purpose. It was supported by three piers, one of which was in the bed of the river below ordinary low-water mark. The ice breaker was so located as to protect the projecting tipple from damage by ice. Such parts of the ice breaker and tipple as came into contact with the water,

especially near the surface thereof, suffered normal deterioration and had to be replaced accordingly from time to time.

6. By the Rivers and Harbors Act of July 3, 1930, 46 Stat. 918, 928, the plans recommended in House Document No. 190, 70th Congress, First Session, were adopted and authorized by Congress, with a view to a channel depth of nine feet in the Kanawha River, in the course here involved. This depth was attained by abandoning Dams 3 and 4 and constructing a new dam ten miles below plaintiffs' leasehold called Marmet Dam. Marmet Dam was completed and the pool above it filled in March 1934.

7. Plaintiffs' tipple was situated between old locks Nos. 3 and 4, along the pool of the Kanawha River created by Dam No. 4. The ordinary high-water mark at the site of the tipple before raising the pool level was 578 feet above mean sea level, Sandy Hook datum. Completion of the Marmet Dam raised the level of ordinary high-water mark to 590.5 feet. This was an increase above previous high water of 12.5 feet.

8. The raising of the pool level by 12.5 feet would have submerged a part of the old tipple, which would have rendered it useless since the barges could not get underneath it. Knowing in advance that the pool level would be raised, plaintiffs built a larger and improved tipple alongside the old one, availing themselves of some of the old material, transferring such of the machinery from the old one to the new as was usable, in this way keeping the through movement of coal as uniform as possible. The ice breakers were raised in height and steel piling was driven at the embankment of the four-acre tract to prevent flooding thereof and sloughing off into the river by the raised level of the pool.

The capacity of the new tipple was practically the same as the old tipple.

The improvements so made were under a permit given by authority of the Secretary of War, under the provisions of section 10 of the Act of Congress approved March 3, 1899,* making appropriations for public works on rivers and harbors.

*30 Stat. 1121.

9. Plaintiffs supplied coal to the Appalachian Electric Power Company, whose plant was in the same pool as plaintiffs' tipple, about three miles downstream, and which served a large industrial district. The power company used nut and slack coal, which represented about 50 percent of plaintiffs' output, leaving lump and egg coal for the general market. Slack coal could not profitably have been shipped by rail, and transporting it on barges to the Appalachian Electric Power Company turned the mining operations that would otherwise have been conducted at a net loss into a profitable business. The mining company was fairly dependent upon the power company for its continued existence.

The coal storage capacity of the power company was limited, and this limitation required a reasonably steady stream of supply from plaintiffs' tipple. Plaintiffs could not afford to lose the business of the Appalachian Electric Power Company and this was their chief reason for keeping deliveries continuous.

10. The raising of the pool level 12.5 feet permanently placed under water 0.459 acres of the four-acre tract. The steel sheet piling driven along the bank prevented further inundation of the four-acre tract, and prevented inundation underneath and adjacent to the tipple.

The fair and reasonable value of the leasehold interest in the land thus inundated was $92.00.

There was also 0.172 of an acre in this tract overflowed periodically by the pool, due to raising the level of the pool by the Marmet Dam, destroying its value, which was $52.00.

By the driving of the steel sheet piling additional land was saved from overflow. The fair value of plaintiffs' leasehold interest therein was $556.00.

There has been no damage to moorage rights.

11. The fair and reasonable value of the old tipple before raising of the pool was $25,000. Its value thereafter was that of scrap or junk and was $5,958.55.

The fair and reasonable cost of the new tipple, taking into consideration use of material transferred thereto from the old tipple, was $33,732.30. This amount was actually expended by the railroad company on the construction.

The new tipple was of more modern design and construction than the old tipple, and was an improvement over the old tipple.

12. The fair and reasonable value of the leasehold interest in the four-acre tract, from which projected the tipple, was $1,700 an acre at the time of raising of the pool level, exclusive of improvements.

13. During the years 1921 to 1940 the comparative tonnage of coal shipped (1) by rail from the colliery company's mines and (2) over the tipple by barge was as follows:

Year	Tons		Ratio	
	Rail	Barge	Rail	Barge
1921	604, 880	80, 460	88	12
1922	558, 104	29, 595	95	5
1923	553, 029	91, 710	86	14
1924	583, 188	101, 308	85	15
1925	444, 415	65, 350	87	13
1926	794, 527	157, 494	83	17
1927	864, 146	216. 035	80	20
1928	929, 544	52, 531	95	5
1929	679, 446	223, 404	75	25
1930	472, 237	239, 214	66	34
1931	388, 840	202, 010	66	34
1932	453, 011	65, 827	87	13
1933	346, 097	193, 855	64	36
1934	298, 181	236, 294	56	44
1935	303, 064	311, 326	49	51
1936	373, 318	291, 805	56	44
1937	416, 616	297, 649	58	42
1938	360, 935	428, 045	46	54
1939	349, 262	591, 475	37	63
1940	318, 069	879, 800	27	73

14. During the fifty years preceding the construction of Marmet Dam, there was, based on open-river conditions, an average of one flood every half year that reached an elevation of 594.4 feet at the mouth of Kelley's Creek, an average of one flood a year that reached an elevation of 599 feet at that point, an average of one flood every two years that reached an elevation of 603.4 feet, an average of one flood every four years that reached an elevation of 607.4 feet, and an average of one flood every eight years that reached an elevation of 612.4 feet.

Floods in the Kanawha River are sudden and of short duration, being commonly known as "flash" floods. The pool level, as maintained by the artificial hydraulic system, is relatively stable.

The ordinary high-water mark heretofore given in these findings is based on the line where vegetation in general, other than aquatic, begins on the uprise from the water's edge.

15. May 20, 1938, the railroad company transmitted the following communication to the chief of the Miscellaneous Civil Section, Corps of Engineers, War Department:

> We have been referred to you by Mr. O. A. Reynolds, Vice President of The Cleveland Chamber of Commerce, as one who would furnish us information as to procedure and to whom we shall make claim, and under what act or authority we shall present the same for certain damages we have suffered.
>
> Briefly, the facts are as follows:
>
> Some years ago we leased at Cedar Grove, W. Va., a parcel of land abutting on the Kanawha River some eight or nine hundred feet, and extending to the low-water mark of the river. In 1903 a tipple was built, in pursuance of permission granted by the Secretary of War, and was erected and built in accordance with the terms, conditions and requirements of the permit. Said permit contained no reservation as to the right to increase the river stage. The tipple extended from the top of the river bank out over the river and was supported by three piers or supports—one in the river near the end of the tipple; one at or near the edge of the water at the old or formerly level or pool stage; and one on the slope of the river bank.
>
> Said tipple was erected for the purpose of loading barges which were placed under the tipple on either side of the pier in the river, and the coal was dumped or unloaded into the barges from railroad cars on the tracks extending out on the tipple.
>
> On or about March 17th, 1934, there was erected what is known as the Marmet Lock and Dam, which was built under authority of Congress granted in the River & Harbor Act approved July 3, 1930. The construction of this lock and dam raised the level or pool stage of the water about 12.1 feet, submerging a part of the river bank and making it impossible to load coal into the barges on the river by means of the tipple. The surface of the water at the new level or pool stage was too near the underside of the tipple to permit the placing of barges under it. The cribbing supporting the tipple at the edge of the old pool stage was submerged and the

other cribbing support on the river bank was partly submerged. The tipple itself was not submerged or damaged by raising the water level, nor was the pertinent loading machinery on the river bank injured.

The use of the tipple for loading coal into barges, as well as the use of the river bank actually submerged was completely destroyed, and in order to be able to load coal into barges on the river, it was necessary for us to tear down the old tipple and build a new one.

The cost of the old tipple was $37,648.06, against which depreciation amounting to $13,406.17 had been charged, leaving a depreciated value of $24,241.89 at the time the tipple was torn down. $5,570.00 was realized from the timber, lumber, steel and other materials in the tipple. This left a net loss of $18,671.89 on the tipple structure alone, exclusive or regardless of the damage resulting from the submerging of the river bank.

A new tipple was built at a cost of $29,239.82, and $1,560.88 additional was spent for the installation of piers, piling, etc., necessary for the construction and use of the new tipple.

Assuring you of our appreciation of the information herein requested at an early date, we are,

The addressee replied July 11, 1938:

Reference is made to your letter of May 20, 1938, requesting information as to the procedure to make a claim for alleged damages to the Kelley's Creek Colliery Company's coal tipple in the Kanawha River at Cedar Grove, West Virginia.

Your letter to this office is sufficient to permit consideration of this case. Investigation discloses that the raising of the pool of the Marmet Dam did not affect said coal tipple in such manner as to amount to a taking thereof within the meaning of the fifth amendment to the constitution.

The construction of the new tipple was necessary in order to take advantage of the better facilities provided by the construction and operation of the new dams on the Kanawha River.

Since there was no taking of the old tipple, there is no legal basis for making payment for the reconstruction thereof.

For the Chief of Engineers:

Plaintiffs have not been paid the whole or any part of the claim made in this suit.

The court decided that the plaintiffs were entitled to recover only for any land above high watermark which was overflowed.

WHITAKER, *Judge*, delivered the opinion of the court:

This is a suit for the taking of plaintiffs' land and for damage to plaintiffs' coal tipple.

The plaintiff, Kelley's Creek & Northwestern Railroad Company, is a subsidiary of plaintiff, Kelley's Creek Colliery Company. At the time this cause of action arose the colliery company operated a coal mine in Kanawha County, West Virginia, and the railroad company was engaged in transporting the coal from the mine to a tipple at the river's edge where it was dumped in barges and transported down the river.

The railroad company had a lease for fifty years on a four-acre tract near the mouth of Kelley's Creek, on which were located its terminal and a tipple. The tipple was located between Locks 3 and 4 on the Kanawha River, a navigable stream. In 1934 the Marmet Dam, which replaced Locks 3 and 4, was completed. This raised the level of the pool about 12 feet. In anticipation of this the railroad company in part protected its land from overflow by sheet steel piling placed along the bank of the river at its tipple. This prevented its lands at the tipple from being overflowed, but about 0.459 of an acre located elsewhere was overflowed. The increase in height of the level of the pool would have rendered the old tipple useless if it had not been replaced, since it would have been partly submerged and barges could not have gotten underneath it. This made it necessary for a new tipple to be built. Plaintiffs sue to recover for the land overflowed and also for the damage to its tipple.

The defendant admits that the railroad company is entitled to recover for any land above high watermark which was overflowed, but denies that plaintiffs are entitled to recover for the damage to the tipple.

The defendant's right to take such measures as to it seemed proper for the improvement of navigation without liability for injury to property, except that located above ordinary

high watermark, is clear; *Marret, et al.* v. *United States*, 82 C. Cls. 1, 13, cert. den. 299 U. S. 545; but the parties disagree as to what was ordinary high watermark before the Marmet Dam was constructed. The plaintiffs say it was 578 feet, and the defendant says it was not less than 590 feet. The commissioner has found that it was 578 feet. We think this is correct.

The Supreme Court in *Alabama* v. *Georgia*, 23 How. 505, 515, defined the bed of the river as—

> * * * that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn.

Ordinary high watermark was defined by the Circuit Court of Appeals for the 8th Circuit in *United States* v. *Chicago, Burlington & Quincy R. R. Co.*, 90 F. (2d) 161, 170, as follows:

> The line of ordinary high water divides the upland from the riverbed. The riverbed is the land upon which the action of the water has been so constant as to destroy vegetation. It does not extend to nor include the soil upon which grasses, shrubs and trees grow. *Harrison* v. *Fite* (C. C. A.) 148 F. 781. Beyond that point the Government can not go without compensation for proximate damages.

This is the law of West Virginia, and is the law generally. In *Union Sand & Gravel Co.* v. *Northcott, et al.*, 102 W. Va., 519, 135 S. E. 592, high watermark was defined as follows:

> * * * The high watermark is the line which the river impresses upon the soil by covering it for sufficient periods to deprive it of vegetation and to destroy its value for agriculture.

Defendant's proof completely disregards these tests. Its sole witness on this point testified that vegetation would not in anyway influence his opinion as to where the ordinary high water-line was. He said that he determined the high-water mark "by the gauge records and the number of open

river rises that occurred in the past, and to what elevation a flood would rise which had an average frequency of occurrence of one time a year." Manifestly, his testimony is wholly without value. The high watermark is not to be determined by arithmetical calculation; it is a physical fact to be determined by inspection of the river bank. It is the line where the water stands sufficiently long to destroy vegetation below it.

Plaintiff's proof satisfactorily establishes as a matter of fact that the high watermark before the construction of the Marmet Dam was 578 feet above mean sea level, Sandy Hook datum. After the construction of this dam the high watermark was 590.5 feet, Sandy Hook datum.

As stated, this increase in the level of the pool overflowed some of plaintiffs' land, the value of which the defendant admits it is entitled to recover if above high watermark. But defendant says, even though high watermark was at 578 feet, the plaintiffs are not entitled to recover for the value of the old tipple which was rendered useless by this increase in the height of the level of the pool.

The flooding of the 0.459 acres was not the thing that rendered the tipple useless. Only damages which accrue as the result of a taking can be recovered. Damages that are not the consequence of the taking cannot be recovered. *United States* v. *Grizzard*, 219 U. S. 180, 183. The tipple was rendered useless not on account of the taking of the 0.459 acres, but because, after the level of the pool had been raised, the tipple would have been in part submerged and barges could not have gotten underneath it.

The tipple was supported by three piers, one of which was some distance back from the shore, another immediately on the shore, and a third in the bed of the stream, its base being at about low-water mark. The tipple projected out over the river beyond this last pier. When the level of the pool was raised, the lower part of the pier was submerged and also the lower part of the tipple. If the defendant is liable at all it is liable on this account and not on account of the taking of the 0.459 acres.

The tipple was constructed under a license issued by the Secretary of War to the colliery company giving it the right—

> * * * to construct and maintain a coal tipple and ice breaker on the north bank of the Kanawha River, at said place, as shown on said plans, upon the following conditions:
>
> * * * * *
>
> 2. That if at any time in the future it shall be made to appear to the Secretary of War that the structures herein authorized are unreasonable obstructions to the free navigation of said waters, said licensee will be required, upon due notice from the Secretary of War, to remove or alter the same so as to render navigation through said waters reasonably free, easy, and unobstructed.

The last paragraph read:

> It is understood that this instrument simply gives permission under said Act of Congress to do the work herein authorized, that it does not give any property rights, and does not authorize any injury to private property or invasion of private rights.

Under the law of West Virginia a riparian owner on a navigable stream owns the land to low-water mark; the title to the bed of the stream beyond low-water mark toward the opposite shore is in the State; *Brown Oil Co.* v. *Caldwell*, 35 W. Va. 95, 13 S. E. 43; *Barre* v. *Fleming*, 29 W. Va. 314; *Norfolk City* v. *Cooke*, 27 Grattan (Va.) 430; but the title to the bed of the stream up to ordinary high-water mark is subject to a paramount servitude in favor of the United States authorizing it to take all necessary and proper steps in the interest of navigation. *Gibson* v. *United States*, 166 U. S. 269. 272; *Scranton* v. *Wheeler*, 179 U. S. 141, 163; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 635, 638; *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251, 259; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 62, 63; *New Jersey* v. *Sargent*, 269 U. S. 328, 337.

It follows from this that any structure erected in the bed of a stream is erected there at the peril of him who erects it. It is erected there with knowledge, actual or constructive, that the Government in the improvement of naviga-

tion may so raise high-water mark as to destroy or impair the utility of the structure. If so, the owner has no redress. It is *damnum absque injuria*. Many hard cases have arisen, but in them and in others the courts have consistently held to this view. *Hood* v. *United States*, 49 C. Cls. 669, 678–680; *Union Bridge Co.* v. *United States*, 204 U. S. 364, 373, 388–389, 399–400; *United States* v. *Chandler-Dunbar Co., supra; Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82; *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251, 260; *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 113 F. (2d) 919, 312 U. S. 592.

In *United States* v. *Chandler-Dunbar Co., supra*, the respondent, by permission of the Government, had erected a power plant on the St. Mary's River, with dams, walls, and dikes in the bed of the river. The United States, in order to improve navigation, proposed to divert a portion of the water in this river into a canal to be constructed parallel with its banks. Prior thereto it instituted condemnation proceedings to condemn respondent's property. The lower court gave the Chandler-Dunbar Co., a judgment for $652,332, of which $550,000 was the estimated value of the waterpower of the river. In valuing the upland taken it included a value for its use in connection with the development of waterpower. The plaintiff claimed it was entitled to damages of $3,450,000. The Supreme Court in an elaborate opinion by Mr. Justice Lurton held that plaintiff was not entitled to recover for the value of the waterpower and that it was entitled to recover only for the value of its upland, without regard to its value connected with the development of waterpower. In the course of its opinion, on page 70, the court said:

> * * * That riparian owners upon public navigable rivers have in addition to the rights common to the public certain rights to the use and enjoyment of the stream which are incident to such ownership of the bank, must be conceded. These additional rights are not dependent upon title to the soil over which the river flows, but are incident to ownership upon the bank. Among these rights of use and enjoyment is the right, as against other riparian owners, to have the stream come to them substantially in its natural state,

> both in quantity and quality. They have also the right of access to deep water, and when not forbidden by public law may construct for this purpose, wharves, docks, and piers in the shallow water of the shore. But every such structure in the water of a navigable river is subordinate to the right of navigation, and subject to the obligation to suffer the consequences of the improvement of navigation, and must be removed if Congress in the assertion of its power over navigation shall determine that their continuance is detrimental to the public interest in the navigation of the river. *Gibson* v. *United States*, 166 U. S. 269; *Transportation Co.* v. *Chicago*, 99 U. S. 635. * * *

In *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co., supra*, the Railway Company had constructed its road along the banks of the Mississippi River. It was assumed by the court for the purpose of its decision that at four places there were embankments, the bases of which were located below ordinary high-water mark. The top of the embankments and the tracks were above ordinary high water. In the course of the improvement of the Mississippi River, Lock and Dam No. 5 was built which raised the ordinary high-water mark. The railroad claimed the right to recover for the value of that part of its submerged embankments which were above the ordinary high-water mark. In the opinion of the Circuit Court of Appeals, reported in 113 F. (2d) 919, 921, the issues were thus stated:

> The appellees disclaimed any damage to their properties from the raising of the level of the river to its ordinary high-water mark, but contended that, under the law, they were entitled to compensation for the damage to their properties caused by the flooding of the railroad embankment above ordinary high-water mark, without regard to whether it was located on lands above or below that level.

The District Court had "ruled that the Government had the right to flow the appellees' embankment and structures up to ordinary high-water mark without incurring liability to pay compensation; but that, since the embankment and structures did not interfere with navigation, the Government would be liable for damages caused by the flooding above ordinary high-water mark."

In the Circuit Court of Appeals the Government contended "that it has the right, in aid of navigation and without payment of compensation, to take or destroy property in the river bed; that this right extends to all property lying between the ordinary high-water marks projected horizontally from shore to shore; that the right of the United States thus to take or destroy property in the river bed without paying compensation includes those portions of such property which are situated above the ordinary high-water mark and extends to intangible riparian rights, including the right to the natural level, width and flow of the stream."

The Court of Appeals held on the authority of *United States* v. *Lynah*, 188 U. S. 445, and *United States* v. *Cress*, 243 U. S. 316, that the railroad company was entitled to compensation measured by the cost of strengthening and protecting the railroad embankments so as to make them safe for use at the higher level of the river created by erection of the dam.

In its brief in the Supreme Court the Government took the same position it had taken in the Court below, to wit, that it was liable for any of the upland above high-water mark which had been taken, but that it was not liable for any property taken above high-water mark, the base of which was in the bed of the stream. This was contrary to the decision of the Supreme Court in the case of *United States* v. *Lynah*, *supra*.

The Supreme Court overruled the *Lynah* case and reiterated what it had many times said before, that "any structure is placed in the bed of a stream at the risk that it may be so injured or destroyed; and the right to compensation does not depend on the absence of physical interference with navigation."

We think this case, as well as the others cited above, is decisive of the case at bar, and we hold that plaintiffs are not entitled to recover for the loss of use of the old tipple.

Plaintiffs in this case can hardly complain of the application of the doctrine of these cases, since the structure was erected in the bed of the stream on condition that the Secretary of War might require its removal or alteration if it should become an obstruction to navigation. The free and

easy navigation of this river required the raising of the level of this pool. This tipple stood in the way of this being done, if the Government would have to pay for the destruction or impairment of its utility. Under the conditions of the license, therefore, the Secretary of War had the right to require that it be removed or altered. Plaintiffs built it with knowledge of this right in the Secretary.

As we said above, the railroad company is entitled to recover the value of its upland which was submerged. This value we find to be $92.00.

The commissioner has also found that there was 0.172 of an acre periodically overflowed, the leasehold value of which he found was $50.00. The testimony supporting this finding is not altogether satisfactory. It is the testimony of Garland D. Tuggle, who was the land appraiser employed by the United States Engineer's office at Huntington, West Virginia. He states that there was 0.172 of an acre which was subject to periodic overflow. He does not say how often it overflowed, or the effect of the overflows, but he does say that the acreage has been "damaged that amount, $52.00 for that portion," which is the total value of the land as fixed by him. He was introduced by the Government and we, therefore, take it to be true that these periodic overflows in fact did destroy the value of this land. This being true, plaintiffs are entitled to recover the amount of $52.00 on this account. *Jacobs* v. *United States*, 290 U. S. 13, 16, and cases there cited.

[~~By the erection of the steel sheet piling, land having a easehold value of $556.00 was saved from overflow. This the plaintiffs are also entitled to recover, since the cost of the piling far exceeded this value.~~]

The commissioner has also found that there has been no damage to moorage rights. The plaintiffs take no exception thereto and we also have found this to be a fact.

On the whole case plaintiffs are entitled to recover the sum [~~of $700.00.~~] $144.00. Judgment therefor will be entered. It is so ordered.

MADDEN, *Judge*; LITTLETON, *Judge*; and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

ON MOTION FOR A NEW TRIAL ON FEBRUARY 7, 1944

WHITAKER, *Judge*, delivered the opinion of the court:

In its motion for a new trial defendant says the court erred in holding that plaintiffs were entitled to recover the value of their lands that would have been overflowed had they not erected sheet piling to protect it.

We entered judgment for two tracts which plaintiffs did not protect and which were actually overflowed. Defendant does not object to this, but says plaintiffs are not entitled to recover for lands not actually overflowed, although they would have been had the piling not been erected.

This seems a strange result to reach. Plaintiffs could have protected its lands which were actually overflowed, but they chose not to do so. For these they can recover; but they cannot recover for lands which would have been overflowed, but which were not in fact, because plaintiffs spent money to keep them from being.

It is, however, the necessary conclusion to be reached, because liability is predicated upon a taking and not upon damages to property. *Gibson* v. *United States*, 166 U. S. 269. The Constitution says private property may not be "taken" without just compensation, but makes no provision for repayment of expenses incurred to prevent a taking.

In *United States* v. *Lynah*, 188 U. S. 445, overruled on another point by *United States* v. *Chicago, Milwaukee, St. Paul, & Pacific RR. Co.*, 312 U. S. 592, the court approved the decision in *Mills* v. *United States*, 46 Fed. 738, holding that there could be no recovery where the taking could have been prevented at a reasonable expense. This was also held in *Manigault* v. *Springs*, 199 U. S. 473, 484–485. See also *Southern Pacific Co.* v. *United States*, 58 C. Cls. 428; affirmed by the Supreme Court without opinion, 266 U. S. 586.

We, therefore, must hold that plaintiffs are not entitled to recover the sum of $556.00, the value of the land protected from overflow by the erection of the sheet piling.

Defendant's motion for a new trial is granted. The conclusion of law and judgment heretofore entered are vacated and withdrawn, and a new conclusion of law now filed enter-

ing judgment for plaintiffs in the sum of $144.00, the former findings and opinion as herein modified to stand. It is so ordered.

MADDEN, *Judge*; and LITTLETON, *Judge*, concur.

JONES, *Judge*; and WHALEY, *Chief Justice*, took no part in the consideration of this motion.

THE CONFEDERATED BANDS OF UTE INDIANS v. THE UNITED STATES

[No. 45585. Decided October 4, 1943]

On the Proofs

Indian claims; retention of interest by Ute Indians in lands ceded to the United States by 1880 agreement.—Where under the provisions of the Act of June 15, 1880, ratifying an agreement made with the plaintiff band of Ute Indians, by which agreement the Indians ceded their remaining lands in Colorado to the United States, it was provided that the lands so ceded, and not allotted to individual Indians, were to be deemed public lands and subject to disposal under the public land laws, but for cash entry only, and the proceeds deposited in the Treasury for the benefit of the plaintiff bands, after repayment of money spent by the United States in connection with the transaction; it is *held* that the Indians, after their right of occupancy was gone, retained an interest in the lands, the proceeds of the sale of which they were to receive.

Same; sovereigns as party to agreement.—The interests and obligations created by the agreement of 1880 do not fit readily into conventional legal concepts, and the problem is further complicated by the fact that one of the parties to the transaction was a sovereign which could and did, regardless of the terms of the agreement, do what it pleased with the lands and proceeds, giving the Indians the privilege of having their legal rights determined at long intervals, such as in 1909 and 1938 when the sovereign deigned to waive its immunity from suit.

Same; interpretation of agreement as shown by actions of the Government.—Where, having taken some of the land for public forests, parks, and monuments, the Government by Act of Congress in 1909 consented to be sued for the value of land so taken; and where the Department of the Interior placed to the credit of the Indians moneys received as rental of some of the land leased for grazing and mining; it was thereby indicated that

both Congress and the Executive Departments considered that the plaintiff Indians had not made themselves legal strangers to the land they conveyed by the Act of June 15, 1880.

Same.—The entire 1880 agreement and the interpretation given to it by the Government itself show that the Government's ownership was intended to be subjected to important limitations, with regard to its powers of disposal, rights of use, and rights to retain and enjoy rents and profits. *United States* v. *Brindle*, 110 U. S. 688, 693; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 394; and *United States* v. *Mille Lac Band*, 229 U. S. 498.

Same; provision of 1938 Act constitutes a "taking," for which plaintiffs are entitled to compensation.—Where in the Act of June 28, 1938, conferring jurisdiction upon the Court of Claims "to hear, determine and render judgment on all legal and equitable claims" which the Ute Indians might have against the United States, including claims arising by reason of any lands taken from the Indians without compensation, it was provided that "said lands [lands ceded by the Ute Indians] to the extent that they have not been disposed of by the United States are hereby declared to be the absolute property of the United States"; it is *held* that such provision of the Act constituted a taking of their interest in the ceded lands, depriving the Ute Indians of any further right to receive the proceeds from the sale or rental of their lands, and for such taking the plaintiff Indians are entitled to recover the value of the remaining lands as of 1938, the time of the taking of their interest.

Same; further proceedings under Rule 39 (a).—In other proceedings, under Rule 39 (a) of the Court of Claims, it will be necessary to determine the amount of the lands which remain unsold and not otherwise appropriated by the Government to other uses, as well as to ascertain the value of the land taken, there being nothing in the 1880 agreement or any other pertinent arrangement between the parties which fixes that value.

The Reporter's statement of the case:

Mr. Ernest L. Wilkinson for plaintiffs. *Messrs. John W. Cragun* and *W. Glenn Harmon* were on the briefs.

Messrs. Raymond T. Nagle and *Benjamin F. Pollack*, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the defendant.

The court made special findings of fact as follows upon the stiulation of the parties and the evidence adduced:

1. Plaintiffs timely filed this suit pursuant to the special jurisdiction conferred upon this court by Act of June 28,

1938, Chap. 776, 52 Stat. 1209, as amended by Act of July 15, 1941, Chap. 299, 55 Stat. 593. By such legislation this court was authorized to "hear, determine, and render final judgment on all legal and equitable claims of whatsoever nature which the Ute Indians * * * may have against the United States, including * * * claims arising * * * by reason of any lands taken from them, without compensation, * * *." Section 6 provides, in part, that:

> If the Court shall find that any lands formerly belonging to the said bands of Ute Indians or any of them, have been taken by the United States without compensation therefor and * * * disposed of in any manner whereby the said Indians have been deprived of the use or benefits of such lands and the natural resources thereof, it is hereby declared that such action shall be sufficient grounds for equitable relief and the Court shall render judgment in favor of said Indians, and shall award to them, as for a taking under the power of eminent domain, compensation for all such land and natural resources, * * *.

2. Plaintiffs are a confederation of the Uncompahgre (sometimes designated as Tabequache), White River (sometimes designated as Yampa and Grand River), Southern and Ute Mountain Ute (which at the time of the agreement of March 6, 1880, hereinafter referred to, were jointly referred to as Southern Utes, and sometimes designated as Capote, Muache and Weeminuche) Bands of Ute Indians, who were parties to an agreement proposed by the Act of Congress of June 15, 1880, Chap. 223, 21 Stat. 199; 1 Kappler 180, which was accepted and ratified by plaintiffs.

3. Under a treaty of March 2, 1868, 15 Stat. 619; 1 Kappler 990, Article II, a large reservation in western Colorado was set apart for the absolute and undisturbed use and occupation of plaintiffs and such other friendly tribes as they might be willing, with the consent of the United States, to admit among them. This territory was bounded on the east by the 107th degree of west longitude; on the north by a line 15 miles north of the 40th parallel of north latitude; on the west by the western boundary of Colorado; and on the south by the southern boundary of Colorado.

4. By the agreement ratified, confirmed, and amended in the Act of June 15, 1880, which was in turn accepted and ratified by plaintiffs, plaintiffs ceded to defendant all territory in Colorado then reserved for their use, after the allotment of certain lands to individual members of plaintiff bands as provided by said agreement. Section 3 of this agreement reads:

> That the Secretary of the Interior be, and he is hereby, authorized to cause to be surveyed, under the direction of said commissioners, a sufficient quantity of land in the vicinities named in said agreement, to secure the settlement in severalty of said Indians as therein provided. And upon the completion of said survey and enumeration herein required, the said commissioners shall cause allotments of lands to be made to each and all of the said Indians, in quantity and character as set forth in the agreement above mentioned, and whenever the report and proceedings of said commissioners, as required by this act, are approved by the President of the United States, he shall cause patents to issue to each and every allottee for the lands so allotted, with the same conditions, restrictions and limitations mentioned therein as are provided in said agreement; and all the lands not so allotted, the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for the disposal of the public lands, at the same price and on the same terms as other lands of like character, except as provided in this act: *Provided*, That none of said lands, whether mineral or otherwise, shall be liable to entry and settlement under the provisions of the homestead law; but shall be subject to cash entry only in accordance with existing law; and when sold the proceeds of said sale shall be first sacredly applied to reimbursing the United States for all sums paid out or set apart under this act by the government for the benefit of said Indians, and then to be applied in payment for the lands at one dollar and twenty-five cents per acre which may be ceded to them by the United States outside of their reservation, in pursuance of this agreement. And the remainder, if any, shall be deposited in the Treasury as now provided by law for the benefit of the said Indians, in the proportion hereinbefore stated, and the interest thereon

> shall be distributed annually to them in the same manner as the funds provided for in this act: *Provided further*, That the subdivisions upon which are located improvements to be appraised, as provided for in section two of this act, shall be offered to the highest bidder at public sale, after published notice of at least thirty days by the Secretary of the Interior, and the same shall be absolutely reserved from occupation or claim until so sold.

5. On January 5, 1882, the President of the United States set apart a reservation for the use of the Uncompahgre Band, 1 Kappler 901. On August 28, 1881, the members of the Uncompahgre Band completed their removal from their reservation in Colorado to the place selected for them in Utah and at about the same time the White River Utes completed their removal to the Uintah Reservation in Utah, as provided for in the said agreement. The Southern Utes remained upon their former reservation and received allotments along and within its southern border and partly within the State of New Mexico.

6. After the removal of the Uncompahgre and the White River Indians from the State of Colorado, a steady tide of immigration of white settlers poured into the reservation vacated by the said Indians, and much of the land was settled upon. Some of these settlers had doubts as to whether they had the right to make entry on said lands because surveys of the lands reserved for the Indians in Utah had not yet been made and the allotments and patents had not been completed. To remove such doubts Congress enacted the Act of July 28, 1882, 22 Stat. 178, section 1, which provided:

> That all of that portion of the Ute Indian Reservation in the State of Colorado lately occupied by the Uncompahgre and White River Utes be, and the same is hereby, declared to be public land of the United States, and subject to disposal from and after passage of this act, in accordance with the provisions and under the restrictions and limitations of section three of the act of Congress approved June fifteenth, eighteen hundred and eighty, chapter two hundred and twenty-three, except as hereinafter provided, under regulations to be prescribed by the Secretary of the Interior in accordance with the provisions of this act.

Thereafter, several millions of acres of the lands ceded under the agreement of March 6, 1880, as ratified by the Act of June 15, 1880, were sold as public lands.

By an act of Congress approved March 3, 1909, 35 Stat. 781, 788–789, jurisdiction was conferred upon the Court of Claims to carry into effect the agreement of 1880 and to that end conferring jurisdiction on the court to hear, determine, and render final judgment on the claims and rights of the Ute Indians under that agreement, including the value of the lands ceded by said Indians which have been set apart and reserved from the public lands as public reservations or for other public uses under existing laws and proclamations of the President, as if disposed of under the public-land laws of the United States, as provided by said agreement. Pursuant to the jurisdiction so conferred plaintiffs sued the defendant and recovered a judgment for the proceeds of cash sales plus the value of lands set apart and reserved from the public lands as public reservations and for other public use under existing laws and proclamations of the President, from which was deducted all proper debits and offsets for certain amounts gratuitously expended by the United States for the benefit of the Indians. A supplemental judgment included additional sums received by defendant up to July 1, 1910 (*The Ute Indians* v. *United States*, 45 C. Cls. 440, 46 C. Cls. 225).

7. Subsequent to the disposals of land for which plaintiffs recovered a judgment in this Court under the Jurisdictional Act of March 3, 1909, large additional tracts of land, held by the United States under the terms of Section 3 of the Act of June 15, 1880, were disposed of by defendant through entry and sale, homesteads of various kinds, leases and permits of various kinds, stock driveways, reservoir sites, and establishment of various reservations for public uses such as national forests, national parks, and monuments, etc.

8. A substantial amount of land (thousands of acres) held by the United States under the terms of Section 3 of the Act of June 15, 1880, and which was undisposed of by the defendant at the time of the judgment of this Court pursuant to the Jurisdictional Act of March 3, 1909, and which

was north of and including township 35 north, still remained undisposed of by the defendant on the date of the approval of the jurisdictional act of June 28, 1938, under which this suit was filed.

9. By the Indian Reorganization Act of June 18, 1934, Chap. 576, 48 Stat. 984, Sec. 3, the Secretary of the Interior was authorized, upon finding it to be in the public interest, to restore to tribal ownership the remaining surplus lands of any Indian reservation theretofore opened to sale, subject to existing rights or claims. Purporting to act pursuant to this statute the Secretary of the Interior temporarily withdrew from sale, entry or any other form of disposal under the public land laws, all undisposed of lands within (among others) the former Ute Reservation in Colorado, ceded by the agreement of 1880. 54 I. D. 559. By orders of restoration dated July 17 and November 13, 1937, the Secretary of the Interior purported to restore certain lands in the southern portion of the area ceded in the Agreement of 1880 to the "Ute Mountain Band of Ute Indians of the Southern Ute Indian Reservation in Colorado," and to the "Confederated Bands of the Ute Tribe of Indians, Colorado," respectively.

Many of the lands ceded under the Act of 1880 and undisposed of on June 18, 1934, had been included in grazing districts under the Taylor Grazing Act of June 28, 1934, 48 Stat. 1269, and furnished a necessary basis for the stock-raising industry in the western part of Colorado. Since the Taylor Grazing Act specifically provided that no Indian reservation could be included in a grazing district, the purported restoration by the Secretary of the Interior of public land in Colorado to the Ute Indians created much alarm and uneasiness among the citizens of western Colorado who feared that all the lands not yet disposed of under the 1880 Act might be similarly treated by the Secretary of the Interior. To prevent any further action of this nature, an amendment to the pending bill which became the Jurisdictional Act of June 28, 1938, was offered and adopted, which amendment, as later amended in 1941 to correct errors not here material, is quoted in finding 10.

10. Section 6 of the Act of June 28, 1938, Chap. 776, 52 Stat. 1209 (as amended by the Act of July 15, 1941, Chap. 299, 55 Stat. 593), contained the following language:

> * * * Anything in any other Acts of Congress to the contrary notwithstanding, no lands in Colorado north of and including township 35 north formerly owned or claimed by the Ute Indians or any band thereof shall be restored to tribal ownership under the provisions of section 3 of the Act of June 18, 1934 (48 Stat. 984), and said lands to the extent that they have not been disposed of by the United States are hereby declared to be the absolute property of the United States: *Provided*, That there is hereby added to the existing Southern Ute Indian Reservation in tribal ownership the vacant, undisposed of ceded lands within the following described boundaries:
>
> [Describing by metes and bounds a tract of land in the southern part of the 1868 Reservation.]
>
> * * * *Provided further*, That any orders restoring or attempting to restore to tribal ownership any portion of the lands in Colorado north of township 35 north are hereby rescinded and annulled.

11. Prior to June 28, 1938, the practice of the United States General Land Office was to deposit to the credit of plaintiffs all rentals and royalties under mineral leases and fees under grazing licenses for the ceded Ute Indian lands in the State of Colorado. However, the Department of the Interior interpreted the Act of June 28, 1938, as being inconsistent with a retention by plaintiffs of an equitable interest in the lands, and accordingly directed that proceeds of the lands declared by that act to be the absolute property of the United States should be deposited as proceeds from public lands.

The court decided that under the terms of the jurisdictional act plaintiffs were entitled to recover just compensation for all lands in Colorado north of and including township 35, north, held by the United States for disposal under Section 3 of the Act of June 15, 1880, at the time of approval of the Act of June 28, 1938, Chap. 776, 52 Stat. 1209, subject, however, to the deduction of offsets, if any, and reserving the determination of the amount of the recovery and the amount of

such offsets, if any, for further proceedings, as provided by Rule 39 (a) of the Court of Claims.

MADDEN, *Judge*, delivered the opinion of the court:

By a treaty of March 2, 1868, 15 Stat. 619, a reservation of some 15 million acres was established for the Ute Indians. By an agreement of September 13, 1873, ratified by Act of April 29, 1874, 18 Stat. 36, the Indians ceded to the United States some three million acres of this reservation. See *Ute Indians* v. *United States*, 45 C. Cls. 440, 454 (Finding XI). By Executive Orders of November 22, 1875, 1 Kappler 834, February 7, 1879, 1 Kappler 834, and August 17, 1876, 1 Kappler 834, other lands were added to the reservation.

On March 6, 1880, an agreement was made by the chiefs and headmen of the Utes, which was later ratified by the members of the tribes, to cede their remaining lands in Colorado to the United States, after first providing for certain individual allotments to some members of the tribes. Congress, in ratifying this agreement, Act of June 15, 1880, Chap. 223, 21 Stat. 199; 1 Kappler 180, inserted a provision that the lands ceded to the United States and not allotted to individual Indians, were to be sold by the United States, and the proceeds deposited in the Treasury for the benefit of the Indians, after repayment of money spent by the United States in connection with the transaction. The agreement as ratified by the tribe in July and August included this provision. It was in Section 3 of the Act of June 15, 1880, and was as follows:

> * * * and all the lands not so allotted * * * shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for the disposal of the public lands, at the same price and on the same terms as other lands of like character, except as provided in this act: *Provided*, That none of said lands, whether mineral or otherwise, shall be liable to entry and settlement under the provisions of the homestead law; but shall be subject to cash entry only in accordance with existing law; and when sold the proceeds of said sale shall be first sacredly applied to reimbursing the United States for all sums paid out or set apart under this act by the government

> for the benefit of said Indians, and then to be applied in payment for the lands at one dollar and twenty-five cents per acre which may be ceded to them by the United States outside of their reservation, in pursuance of this agreement [certain individual allotments could be made from land outside of the Ute Reservation]. And the remainder, if any, shall be deposited in the Treasury as now provided by law for the benefit of the said Indians, in the proportion hereinbefore stated [one-half to the Uncompahgre Utes, one-third to the Southern Utes, and one-sixth to the White River Utes], and the interest thereon shall be distributed annually to them in the same manner as the funds provided for in this act: * * *.

After the agreement of 1880, the United States sold, under the public land laws, a large amount of the acreage ceded by the Indians in that agreement. It also took for its own use, for national forests, public monuments, and other uses, large amounts of the acreage. It made no accounting to the Indians either for the proceeds of the sales, or for the lands taken for its own use.

By an Act of March 3, 1909, Chap. 263, 35 Stat. 781, 788, 789, jurisdiction was conferred upon this court to ascertain the amount received by the United States for lands sold, and the value of lands taken. In a suit brought by the Indians pursuant to that Act the Indians were compensated for more than four and one-half million acres. See 45 C. Cls. 440; 46 C. Cls. 225. More than seven million acres were still left subject to the agreement of 1880.

Again, after the litigation in this court, the United States sold many tracts from the remaining land, and took for its own use other tracts for national parks, national forests, monuments, etc. This suit does not involve those sales or takings, recovery for them being sought in another suit now pending in this court. After those sales and takings there were still, in 1938, several million acres left which were subject to the agreement of 1880.

In 1938 a bill was pending in Congress, having as its purpose the conferring of jurisdiction on this court to entertain litigation brought by the Ute Indians on all legal and equitable claims which they might have against the

United States. Because of some events which had occurred between 1934 and 1938, an amendment was made to Section 6 of the bill, which amendment has given rise to serious questions in this case. We now recite those intervening events.

The Indian Reorganization Act of June 18, 1934, Chap. 576, 48 Stat. 984, Sec. 3, authorized the Secretary of the Interior to restore to tribal ownership "the remaining surplus lands of any Indian reservation heretofore opened or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public land laws of the United States." The Secretary of the Interior, purporting to act under this statute, temporarily withdrew from disposal by the United States the Ute lands ceded by the agreement of 1880 but not yet disposed of "until the matter of their permanent restoration to tribal ownership * * * can be given appropriate consideration." Thereafter, by orders of July 17 and November 13, 1937, the Secretary did restore to tribal ownership of the Utes, two tracts of the land, the first containing about 30,000 acres and the second about 8,500 acres. Some of the stock-raising constituents of Senator Adams of Colorado were alarmed when they learned of this action, since, if the Secretary should restore to the Indians the rest of the millions of acres of land remaining subject to the agreement of 1880, as he had the two tracts, he would thereby deprive these stock raisers of much of their grazing area. The Senator therefore prepared an amendment to Section 6 of the jurisdictional bill which was pending in 1938. The amendment was offered and adopted. Section 6, as enacted, with the amendment indicated by italics, was as follows:

> Sec. 6. If the court shall find that any lands formerly belonging to the said bands of Ute Indians or any of them, have been taken by the United States without compensation therefor and set apart and reserved as national reservations or for other public uses or otherwise classified, reserved, or withdrawn from entry and sale under the public land laws or disposed of in any manner whereby the said Indians have been deprived of the use or benefits of such lands and the natural resources thereof, it is hereby declared that such action

> shall be sufficient grounds for equitable relief and the court shall render judgment in favor of said Indians, and shall award to them, as for a taking under the power of eminent domain, compensation for all such lands and natural resources, *any thing in any other Acts of Congress to the contrary notwithstanding, no lands in Colorado north of and including range 35 formerly owned or claimed by the Ute Indians or any band thereof shall be restored to tribal ownership under the provisions of section 3 of the Act of June 18, 1934 (48 Stat. 984), and said lands to the extent that they have not been disposed of by the United States are hereby declared to be the absolute property of the United States:* PROVIDED, *That there is hereby added to the existing Southern Ute Indian Reservation in tribal ownership of the vacant, undisposed of ceded lands within the following described boundaries:*
>
> [*Describing certain lands by metes and bounds.*]
>
> PROVIDED FURTHER, *That any orders restoring or attempting to restore to tribal ownership any portion of the lands in Colorado north of range 35 are hereby rescinded and annulled.*

The bill as enacted containing Section 6, as amended, became the Act of June 28, 1938, Chap. 776, 52 Stat. 1209. Some errors, not here material, in the section as then enacted were corrected by the Act of July 15, 1941. The meaning of the section was not changed.

Unquestionably the amendment to Section 6 of the 1938 act had the following effects. (1) It forbade the Secretary to restore to the Utes any more of the lands in question north of and including township 35.[1] (2) It revoked the Secretary's order previously made restoring some 8,500 acres of land to the Utes, this land lying north of township 35. (3) It either ratified the Secretary's act of restoring, or it transferred, to the Utes, the 30,000 acres adjoining their present reservation, which the Secretary had purported to restore to them by his order of July 17, 1937.

Plaintiffs claim that the Adams amendment had the further important effect of "taking" from them their interest or interests in all of the land covered by the cession and agreement of 1880 which had not theretofore been sold by

[1] The word "range" in the 1938 act was intended to mean "township." The correction was made in the Act of July 15, 1941, referred to above.

the Government or appropriated to its own use. They attribute this effect to the following language in the amendment, in the context in which it was used:

> * * * and said lands to the extent that they have not been disposed of by the United States are hereby declared to be the absolute property of the United States: * * *

They urge that the agreement of 1880, in effect, placed in the Government only such title to and power of disposition over the lands as to enable it to sell them for the benefit of the Indians, thereby making the Government a trustee and leaving the beneficial ownership of the lands in the Indians. This beneficial ownership, they assert, was extinguished by the Adams amendment, without compensation, thus bringing the situation within the jurisdiction conferred upon the court by the other language of Section 6 of the 1938 act, as one entitling the Indians to a judgment for compensation for a taking of their lands.

The Government's response to this claim is that the Indians in the agreement of 1880 conveyed their lands to the Government absolutely, for considerations satisfactory to themselves, and therefore the statement in the Adams amendment that the lands "are hereby declared to be the absolute property of the United States" was no more than a declaration of a status which had existed for nearly sixty years, but which the Secretary of the Interior and perhaps others had misunderstood, and which for that reason needed a clarifying declaration.

The interests and obligations created by the agreement of 1880 do not fit readily into conventional legal concepts, such as trusts, agencies, debts or contractual obligations, and mortgages or security interests. The problem is further complicated by the fact that one of the parties to the transaction was a sovereign which could and did, regardless of the terms of the agreement, do what it pleased with the lands and their proceeds, giving the Indians the privilege of having their legal rights determined only at long intervals, such as in 1909 and 1938 when the sovereign deigned to waive its immunity from suit.

According to the Government's contention, when the Indians, in 1880, "released and conveyed" the title to their lands to the United States, that made the United States the absolute and unqualified owner of the lands. In return, the Indians received the promise of the United States to expend specified sums of money for the education of the Indian youth, and for the removal and resettlement of the Indians to their allotments; to pay certain amounts in annuities and to set up a trust fund for further annuities; to select allotments on property not belonging to the Indians and allot them to individual Indians; to furnish agricultural implements to the Indians on their allotments; to open the lands for sale as public lands "and when sold the proceeds of said sale shall be first sacredly applied to reimbursing the United States for all sums paid out or set apart under this Act by the Government for the benefit of said Indians, and then to be applied in payment for the lands at one dollar and twenty-five cents per acre which may be ceded to them by the United States outside of their reservation, in pursuance of this agreement. And the remainder, if any, shall be deposited in the Treasury as now provided by law for the benefit of the said Indians, in the proportion hereinbefore stated, and the interest thereon shall be distributed annually to them in the same manner as the funds provided for in this Act."

So, the Government urges, the Indians conveyed their lands for some cash and some promises, and that made them legal strangers to the land. As to the cash to be given them and expended for them, it was all to be reimbursed to the Government out of the first proceeds of sales to be made by the Government of the conveyed lands. It was therefore, not an independent consideration paid by the Government, but, to whatever extent necessary, an advancement made to the Indians out of their own prospective funds, the proceeds of sales of the lands. The same may be said of the allotments to be given to some of the Indians on other lands. The Government was to be paid for these at the going rate of $1.25 per acre, out of the Indians' money.

In essence, then, the Indians conveyed their lands to the Government for the latter's promise to open them for sale

as public lands and put the proceeds in the Treasury as the Indians' money. Did the Indians by this conveyance part with all their interests in the land as property? It must have been contemplated that something like what has actually happened, would happen; that a good deal of the land would be fairly promptly selected and bought by settlers; that some of that not selected might be sought by stockmen for grazing leases, or by miners for development leases; that some would not, for a long time, or perhaps ever, be selected for purchase. Did the parties contemplate that, until the land was selected for purchase, the Government, though it owned it outright, was to be restricted by the implications of the agreement from leasing it for grazing or mining; that it must lie useless to both parties and to the public until sold pursuant to the agreement, which sale might never occur? Did the parties mean that the Indians could not say, "The remaining several million acres of this land have been available for sale for almost sixty years, but have not seen sold? The Government cannot use it, so it lies useless. We should like to have it back, unless the Government desires to make some new arrangement with us whereby the land may be used and we may get some return for our having parted with it."

As we have said above, it is impossible to consider this situation as if the parties here were private persons. In fact the Government, by reason of its sovereign immunity from suit, did substantially as it pleased with the land. It converted large parts of it to use as national forests and parks and monuments. It leased some of it to stockmen for grazing, and to miners for mining. It did all these things without consultation with the Indians, yet none of them were authorized by the words of the agreement of 1880. Whether the Government thought it was acting within the implied meaning of the agreement of 1880, when it did these things, does not appear. Because of its immunity, it was not necessary for it to justify them when done. In 1909, after it had taken many of the lands for public purposes it, by statute, gave this court jurisdiction to compensate the Indians for the taking. This is an indication that it did not think that it already owned them, without qualification.

The Department of the Interior put the grazing and mining rentals into the Indian funds. This is an indication that, in the opinion of the Department, the rents and profits of the lands, while they remained unsold, belonged to the Indians.

We can hardly imagine a private owner conveying his lands to another, intending to give him an absolute and irrevocable title to them, and receiving nothing in return but the other's promise that the lands would be made available for sale in a specified way, and, when, as, and if any of them were sold, the proceeds would be given to the conveyor. Such a transaction would be so improvident from the conveyor's standpoint, involving the loss of the use of the land and the probability that he would never receive any return from at least some of it; and so contrary to public policy, preventing the conveyee and others from making any use of the lands for an indefinitely long time, that a court would not find that it had been intended unless clear language showing such an intent had been used. If the intent was not clear, a court would find that a trust or agency had been created, and would permit the conveyor to get back the land so that if it could not be sold it could at least be used. Even if the improvident intent was found, a court of equity might well construct a *quasi*-trust in such a case, in order to do justice and put the land back into use.

In the instant case, it may be that the agreement of 1880 contemplated, from the Government's side, not merely the advantage of making this land available for white settlers who might purchase it, but the advantage of getting the Indians off it and confining them to narrower boundaries where they could more readily be "civilized" or at least watched and restrained. So it may be that the Government did not intend, in 1880, that the Indians should ever get their land back, even if it remained forever unsold. And if that was the public policy which the 1880 statute presupposed, there would have been that reason of policy why a court would not have constructed a remedy of returning the unsold lands to the Indians, even if the Indians could have brought a suit seeking that relief, which of course they could not have done because of the Government's immunity from suits not consented to by it.

Even if, as we have just suggested, it was the intention of the 1880 agreement that the Indians were never to get their land back, even if it remained unsold, we think it was equally the intention that the Government was not to have the use and benefit of the land, but only the power to sell it. It would have been wholly inequitable that the Government, not having paid or promised to pay the Indians anything except out of the proceeds of such lands as should be sold, which proceeds, except as they were so used to reimburse the Government, were to belong to the Indians, should have had the use of land for which it paid nothing. The Government has not, so far as appears, claimed until now that it had that right. On the contrary, having taken some of the lands for public forests, parks, and monuments, it consented in 1909 to be sued for the value of land so taken. When some of the land was leased for grazing and mining, the Department of the Interior placed the rentals to the credit of the Indians. These acts were strong indicia of the opinion of Congress and of the Executive Department concerned that the Government did not have such an absolute ownership of the land as to enable it to devote the land to its own use or to make a profit from permitting its use by others. The Wheeler Act of 1934, which seems to us to have been applicable to the lands in question, was another strong indication that the Government thought that it was not right for it to keep indefinitely lands which Indians had conveyed to it upon its agreement to sell and deliver the proceeds to the Indians, when in fact the lands had not been sold. Whatever may have been the motive of Congress in enacting the 1934 statute, the Department of the Interior in its administration took the view that the plaintiff Indians still had an interest in the unsold lands in question. The Department also took that position in its communication to the Director of the Budget in 1938, recommending Presidential approval of the jurisdictional act with the Adams amendment. Thus everyone concerned on behalf of the Government seems to have thought that plaintiff Indians had not, in 1880, made themselves strangers to the land they thereby conveyed.

The legal or equitable connection between the Indians and their former land is not easy to define, but that there was

such a connection everyone concerned seems to have agreed, until this litigation began. If the connection, or "interest" was no more than a negative right that the United States should do nothing with the land except sell it pursuant to the provisions of the 1880 agreement, that was an important restriction upon the Government's ownership, and left in the Indians some sort of a right or interest in the land correlative with the restriction. That the Indians had at least this much of an interest we have no doubt. If they did, the lands were not then "the absolute property of the United States" as they were declared to be by the Adams amendment in 1938. It follows that that amendment effected an addition to the title of the United States, and an extinguishment of at least some interest in the Indians. It amounted to a "taking" of land of the Indians, within the meaning of the jurisdictional act.

The Government does not make entirely clear what it thinks the rights and privileges of the Government and the Indians were before and after the 1938 act. In its brief, at page 180, it seems to say that the Department of the Interior's practice before 1938 of depositing the rents received from grazing and mining tenants to the credit of the Indians was wrong. It was, if the Government became the absolute owner of the land in 1880. But if it did, it could sell the land or use it for its own purposes as it chose, and without accountability. Yet surely it could not use instead of selling, and thereby deprive the Indians of their only possibility of getting any return for their conveyance. And it was so obviously equitable, or at least moral, to give the Indians the rents from lands that were not sold but rented, that it inclines us to think it was also legal, and not wrong.

As to the status since the 1938 act, the Government says at page 184 of its brief that the Indians still have, all that they have ever had since 1880, a right to the proceeds of their sale "if and when the lands were sold"; that therefore nothing was taken from them in 1938 and their suit must fail. This would seem to mean that the Government still has no right to convert any of the land to use as parks, forests, or monuments; that if it does so it violates its contract of 1880 and could perhaps, except for its

sovereign immunity, be enjoined from so doing. But what kind of "absolute property of the United States" is it which cannot be used for a public park without violating the rights of the Ute Indians? And what kind of a contract right is that of the Ute Indians to the proceeds of the sale of the lands, if the holder of the title can in the meantime make a profit for itself or serve another purpose for other constituents by leasing the land instead of selling it? And if it can lease it, can it tie it up under a grazing lease which makes it difficult to sell it, and thus divert the proceeds of the land from the Indians' fund to its own Treasury [See plaintiffs' reply, p. 277 for elaboration of this] and the lands to a purpose which will serve a policy of the United States but will prevent the Indians from getting paid for them.

No judicial decision has been called to our attention which is not consistent with the Indians' claim that, under the agreement of 1880, they retained an interest in their former reservation. Statements that the United States was, in comparable situations, a trustee for the Indians for the purpose of selling the land, appear in the opinions of the Supreme Court of the United States in a number of cases. The most pointed of these statements are in *United States* v. *Brindle*, 110 U. S. 688, 693; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 394; and *United States* v. *Mille Lac Band*, 229 U. S. 498. The Government urges that the language of the agreement in question in the *Brindle case*, to the effect that the lands were to be surveyed, entered, etc., "in the same manner" as public lands of the United States, showed that the lands were not really to be public lands, and was merely a shorthand expression granting to the United States the power of disposition of the lands as if the lands were public lands. The Government urges, by way of contrast, the language of Section 3 of the Act ratifying the 1880 agreement which said that the lands

> shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for the disposal of the public lands, at the same price and on the same terms as other lands of like character, except as provided in this Act:

and the corresponding applicable language in the Act of 1882, 22 Stat. 178, providing that the land

> be, and the same is hereby, declared to be public lands of the United States.

The Government says that these forms of words are words showing complete ownership and not the ownership of a trustee or other limited owner. But we think the whole 1880 agreement and the interpretation given to it by the Government itself show that the Government's ownership was intended to be subjected to important limitations, with regard to its powers of disposal, rights of use, and rights to retain and enjoy rents and profits. The language upon which the Government relies is certainly not strong enough to contradict the otherwise clear intent of the agreement to curtail the Government's ownership. We think therefore that the *Brindle case* may not be satisfactorily distinguished on the ground of the difference in language. And we think that the *Hitchcock* and *Mille Lac cases*, *supra*, are not satisfactorily distinguished by the fact that in those cases some of the bands of Indians retained, until their allotments were made, some right of occupancy, as to some of the lands. The question in those cases, as here, was whether the Indians still had an interest, after their right of occupancy was gone, in the lands, the proceeds of whose sale they were to receive. The court placed no emphasis upon the fact of the right of occupancy, and, as to much of the land in dispute and as to some of the bands of Indians, there was no right of occupancy.

We do not think it is necessary in the instant case to determine whether the Government was, in the ordinary sense of that word, a trustee of the lands in question for the plaintiffs. We think it is enough to determine, and we do determine, that, under the agreement of 1880, the plaintiff Indians retained an interest in the lands, which interest was completely destroyed by the United States when it inserted the Adams amendment in the 1938 act. And we think that the way to fairly compensate the Indians for the taking of that interest, which taking finally deprived them of any further right to receive the proceeds from the sale or rental of the land, is to pay them the value of the land as of 1938, the time of the taking of their interest.

We conclude, therefore, that plaintiffs are entitled to recover. In further proceedings it will be necessary to determine the amount of the lands which remain unsold and not otherwise appropriated by the Government to other uses. It will also be necessary to ascertain the value of the land taken, there being nothing in the 1880 agreement or any other pertinent arrangement between the parties which fixes that value.

It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge; and* WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

FABIAN L. PRATT v. THE UNITED STATES

[No. 45618. Decided October 4, 1943]

On the Proofs

Pay and allowances; officer in Medical Corps, U. S. Army, rated as qualified airplane pilot entitled to pay of flying officer.—Decided upon the authority of *Andrew W. Smith* v. *United States*, 98 C. Cls. 392.

The Reporter's statement of the case:

Mr. Samuel T. Ansell, Jr., for plaintiff. *Mr. Mahlon C. Masterson* and *Ansell, Ansell & Marshall* were on the brief.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

Plaintiff, a commissioned officer in the United States Army, sues to recover the difference between an increase of 50 per centum of his base and longevity pay and the pay received by him while on duty requiring him to participate regularly and frequently in aerial flights for the period June 1, 1939, to date of judgment.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff was appointed First Lieutenant, Medical Section, Officers' Reserve Corps, June 30, 1917, accepted July 31, and entered on active duty August 7, 1917. He was ap-

pointed Captain, Medical Corps, United States Army, February 17, 1919, accepted March 7, 1919, and this appointment was vacated September 18, 1920. On the same date he was appointed First Lieutenant, Medical Corps, Regular Army, as of July 1, 1920, and accepted September 18, 1920. He was promoted to Captain on September 10, 1920, to Major, August 7, 1929, and to Lieutenant Colonel on August 7, 1937. He was promoted to Colonel, Medical Corps, Army of the United States, February 1, 1942, and accepted March 7, 1942, which position he was occupying at the date of the taking of testimony in this proceeding on August 6, 1942. His active commissioned service has been continuous from August 7, 1917, at least until August 6, 1942.

2. Upon completing the required course at the Air Service Balloon & Airship School, plaintiff was rated a balloon observer and airship pilot effective December 19, 1923. At that time plaintiff was a flight surgeon and has been, continuously, ever since. Upon completing the prescribed course of instruction at the Air Corps Primary Flying School, plaintiff was rated junior airplane pilot March 29, 1927, the order giving him that rating reading as follows:

> 27. Captain Fabian L. Pratt, Medical Corps, a qualified Flight Surgeon, having satisfactorily completed the prescribed course of instruction at the Air Corps Primary Flying School, is, under the provisions of Section 2, General Orders 19, War Department, 1923, rated Junior Airplane Pilot.

By a similar order dated October 9, 1929, plaintiff was rated an airplane pilot and that rating has never been revoked. In order to receive that rating, plaintiff completed the requirements of flying all types of military fighting aircraft for a total of approximately 300 hours.

3. Effective June 1, 1939, plaintiff was required to participate regularly and frequently in aerial flights, the order with respect thereto reading as follows:

> 7. Pursuant to authority contained in paragraph 2 d. Army Regulations 35-1480, dated November 21, 1932,
>
> | *Rank* | *Name* | *Organization* |
> |---|---|---|
> | Lieut. Colonel__ | Fabian L. Pratt__ | Medical Corps, Flight Surgeon |
>
> is hereby required to participate regularly and frequently in aerial flights, effective June 1, 1939.

Plaintiff has been subject to similar orders since June 1, 1939 with the exception of two short periods in 1939 when he was relieved from duty involving flying.

Plaintiff's duties as a flight surgeon were to observe and study the psychological and physiological effects of conditions encountered on flights and the uses of various types of equipment by flying personnel. His duties also involved the selection and medical care of flying personnel. Some of these duties made it necessary for plaintiff to fly an airplane, while others did not. In some instances he flew as a pilot and, in others, as an observer. Plaintiff has flown various types of military aircraft a total of approximately 3,000 hours.

4. During the period from June 1, 1939, to June 30, 1942, except for the months of October, November, and December, 1941, and January 1942, plaintiff performed under competent orders the flights prescribed by the Executive Order of June 27, 1932, and fulfilled the requirements entitling him to receive flying pay. During that period plaintiff made 152 aerial flights in army aircraft totaling 332¼ hours.

5. Plaintiff was credited currently with increased pay for making aerial flights during the period from June 1, 1939, to June 30, 1941, as follows:

For the month of June 1939 at the rate of $120 a month.

For the periods July 22 to October 13, 1939, and October 15, 1939, to June 30, 1941, at the rate of $60 a month. Increased rate of pay of $60 a month has also been paid since June 30, 1941.

If plaintiff is entitled to 50 per centum of his base and longevity pay for making aerial flights, there is due to him as additional flying pay for the period he received flying pay currently within the period from June 1, 1939, to June 30, 1941, the sum of $3,261.49. The claim is a continuing one.

The court decided that the plaintiff was entitled to recover, in an opinion *per curiam*, as follows:

The facts in this case show that plaintiff was rated as an airplane pilot by the War Department under date of October 9, 1929, and that his rating as a pilot has never been revoked. They further show, without dispute, that plaintiff performed under competent orders the flights

prescribed and fulfilled the legal requirements entitling him to receive flying pay. However, plaintiff was not paid an increase of 50 per centum of his base and longevity pay while on duty requiring him to participate regularly and frequently as a flying officer, but, instead, was paid the flying pay for the month of June 1939 at the rate of $120 a month, or $1,440 a year, and, thereafter, at the rate of $60 a month or $720 a year, which was the rate of pay provided by statute for nonflying officers. Plaintiff was also a flight surgeon.

The question presented is governed by the decision of this court in *Andrew W. Smith* v. *United States*, 98 C. Cls. 392. Under that decision, the plaintiff is entitled to recover increased flying pay at the rate of 50 per centum of his base and longevity pay at the beginning of the period of his claim to date of judgment.

Judgment will be entered in favor of plaintiff upon receipt of a report from the General Accounting Office showing the amount due.

In accordance with the above opinion and upon a report from the General Accounting Office showing the amount due thereunder to be $5,093.56, judgment for the plaintiff was entered February 7, 1944, in the sum of $5,093.56.

JACK L. CARROLL v. THE UNITED STATES

[No. 45798. Decided February 7, 1944]

On Defendant's Demurrer

Gratuity to Federal Prisoner released on parole; act of July 3, 1926.—Under the provisions of the act of July 3, 1926, a Federal prisoner on his release from prison, whether released by final discharge or on parole, is entitled only to such suitable clothing and such sum of money, not to exceed $20.00, as may be authorized by the Attorney General, in his discretion.

Same; intention of Congress to repeal former acts; legislative history.—From the legislative history of the act of July 3, 1926, it is apparent that Congress was undertaking in one act to legislate fully on the subject of gratuities to Federal prisoners released from prison, and the previous acts of March 3, 1891, and June 25, 1910, were thereby repealed.

Same; repeals by implication.—The cardinal rule is that repeals by implication are not favored but if the later act covers the whole subject of an earlier one and is clearly intended as a substitute it operates as a repeal of the earlier act. *Posadas* v. *National City Bank*, 296 U. S. 497, cited.

The Reporter's statement of the case:

Mr. Jack L. Carroll, pro se.

Mr. Assistant Attorney General Francis M. Shea, for the defendant. *Mr. Milton Kramer* and *Mr. E. E. Ellison* were on the briefs.

In this case an order and opinion were filed October 4, 1943, overruling defendant's demurrer on the ground that where a prisoner was released from Federal prison, on July 29, 1939, it was not material under section 4 of the Act of June 29, 1932 (47 Stat. 381; U. S. Code, Title 18, section 716b), whether he was released on parole or released because on that date his sentence had expired, with the statutory credit for good conduct.

Defendant filed a motion for reconsideration, which was argued on January 3, 1944.

On February 7, 1944, an order was entered withdrawing and setting aside the opinion and order of October 4, 1943, overruling the demurrer, and a new order, with opinion, was entered sustaining the demurrer and dismissing the petition.

Plaintiff did not appear by counsel. Under permission of the court he filed on his own behalf a typewritten petition *in forma pauperis*. He is a drug addict, confined in the McNeil Island penitentiary in the State of Washington. His petition shows that he was convicted on May 7, 1936, and was released from prison on July 29, 1939. He was again convicted on February 3, 1940, and sentenced to a term of three year. He was released on May 26, 1942, but apparently was immediately arrested on a warrant sworn out by the United States Board of Parole for having broken the conditions of his release on July 29, 1939. He brought suit to recover the gratuity to which he says the law entitles him upon being released from prison.

WHITAKER, *Judge*, delivered the opinion of the court:

This case is before us on defendant's motion for reconsideration of our former order overruling the demurrer to plaintiff's petition.

As stated in our former opinion, section 6 of the Act of March 3, 1891, had reference only to prisoners "discharged" from jail or prison. That Act provided that such prisoners should be furnished with suitable clothing and "$5.00 in money." When Congress came to provide for the paroling of United States prisoners it made applicable to them the "usual gratuities" to which discharged prisoners were entitled, consisting of "clothing, transportation, and $5.00 in money." When this Act was passed, Congress was evidently of the opinion that its former Act in 1891, giving certain gratuities to discharged prisoners, would not be applicable to prisoners paroled, unless expressly made so, since a paroled prisoner was not a prisoner discharged, but one that might be recalled to serve the rest of his sentence. So, when we came to consider the effect of the Act of July 3, 1926, 44 Stat. 901, c. 795 (Title 18, sec. 746, U. S. C. A.), giving "discharged" prisoners such suitable clothing and such sum of money, not to exceed $20.00, as might be authorized by the Attorney General, we held that, since no mention was made of paroled prisoners, it had application only to prisoners discharged and had no application to a paroled prisoner. The result, therefore, was that the Act of 1910 giving paroled prisoners $5.00 in money remained in full force and effect. We so held.

However, on the motion for reconsideration of our order overruling the demurrer the Attorney General for the first time supplies us with the legislative history back of the Act of 1926. From this it appears that Congress was undertaking in one Act to legislate fully on the subject of gratuities. The report from the Committee on the Judiciary (H. R. Report No. 1208, 69th Cong. 1st Sess.) stated:

> This bill makes uniform the clothing allowance and cash gratuity to be furnished persons discharged from prison. At present the matter is covered by five separate statutes, which provide a cash gratuity ranging from $5.00 to $20.00 * * *.

This report indicates that it was, indeed, the intention of Congress to do away with the various provisions relating to gratuities and to embrace within one Act the entire law on the subject relating to both paroled and discharged prisoners. Of course a paroled prisoner is one "discharged from prison," although not finally discharged of the sentence imposed upon him.

We are also told that the department charged with the administration of the Act has consistently applied the Act of 1926 not only to "discharged" prisoners, but also to paroled prisoners. This department, in other words, understood the Act of 1926, which spoke of "the discharge from any prison," to have reference, among others, to paroled prisoners. This department, of course, is familiar with prison nomenclature, and if the Act is susceptible of the construction it places upon it, we ought to be slow to disturb it.

Upon further consideration, we think it is susceptible of this construction and we, therefore, hold that the Act of 1926 has application not only to discharged prisoners, but to paroled prisoners as well. If this be true, then a prisoner on his discharge or on his parole is entitled to such suitable clothing as may be authorized by the Attorney General and to an amount of money not in excess of $20.00.

This Act of 1926 entitled a prisoner only to such amount of money as might be authorized by the Attorney General. It entitled him to nothing as a matter of right. Hence, under it the plaintiff is not entitled to recover. Under the Acts of 1891 and 1910, it is true, plaintiff was entitled as of right to $5.00, but inasmuch as we are now of the opinion that the purpose of the 1926 Act was to incorporate in one Act all prior provisions relating to gratuities, we must hold that the Act of 1926 was intended as a substitute for prior Acts and so repealed the Acts of 1891 and 1910.

In *Posadas* v. *National City Bank*, 296 U. S. 497, the Supreme Court reiterated the rules governing repeals by implication and reviewed some of the former cases on the subject. In that case, on page 503, it was said:

> * * * The cardinal rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if pos-

sible. There are two well-settled categories of repeals by implication—(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest; otherwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act and will continue to speak, so far as the two acts are the same, from the time of the first enactment.

cf. *Eastern Extension Tel. Co.* v. *United States*, 231 U. S. 326.

The Committee Report shows that this Act was plainly intended as a substitute for prior Acts on the subject. We must hold, therefore, that it repealed the former acts. Plaintiff, therefore, is entitled only to such benefits as are provided for in the Act of 1926, to wit, such benefits as may be authorized in the discretion of the Attorney General.

The result is that our former opinion and order overruling the demurrer must be withdrawn and set aside, and an order will now be entered sustaining the demurrer and dismissing plaintiff's petition. It is so ordered.

MADDEN, *Judge;* and LITTLETON, *Judge*, concur.

JONES, *Judge;* and WHALEY, *Chief Justice*, took no part in the decision of this case.

CLIFFORD A. DUNN v. THE UNITED STATES

[No. 45711. Decided December 6, 1943. Plaintiff's motion for new trial overruled February 7, 1944]

On the Proofs

Government contract; basis of measurement for excavation established by contracting officer.—Where, in a contract for the construction of abutments, piers and underpasses on certain United States highways, it was provided that, for the purposes of payment for excavation, measurement would be made to slopes specified in the contract for common excavation and rock, respectively; and where, however, it was further provided that measurement for

payment would be made, if warranted in the opinion of the the contracting officer, to the most practical dimensions and lines as staked out or otherwise established by the contracting officer; and where the contracting officer adopted, as the basis of measurement for monthly payments, the slopes which the contractor had, on his own motion, begun to cut and which had proved satisfactory; it is *held* that by such action the contracting officer thereby "established" the method by which the excavations would be measured for payment, within the terms of the contract, and the plaintiff is not entitled to recover.

The Reporter's statement of the case:

Mr. George R. Shields for plaintiff. *Mr. Wilson S. Wiley* and *Messrs. King & King* were on the briefs.

Mr. Brice Toole, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is an individual engaged in the general contracting business, with his principal office in the City of Klamath Falls, Oregon. On May 25, 1939, plaintiff and the defendant entered into a contract for the construction of abutments and piers for Sacramento River bridge, second crossing; U. S. Highway underpass at the stations 5350 and 02.33 and abutments and piers for Doney Creek bridge; and U. S. Highway underpass at stations 5371 and 82.39, Kennett Division, Central Valley Project. A copy of the contract, including schedules 1, 2, and 3, was filed as Exhibit A to the petition and is incorporated herein by reference. Extracts of the specifications, insofar as they are pertinent to a determination of this case, are also made a part of plaintiff's Exhibit A, and are incorporated herein by reference.

2. Upon completion of the work to be performed under the contract plaintiff executed a release, dated April 2, 1940, with the following exception noted on the release form:

> The contractor claims additional payment due him by reason of misinterpretation, on the part of the contracting officer, of paragraph 39, page 22, covering calculations of quantities of excavated material of specifications No. 838 General.

3. Paragraph 39 of the Specifications, General Conditions, provides in part:

39. *Excavation for abutments, wing walls, and piers, except piers Nos. 3 and 4 for Sacramento River bridge.*—The items of the schedules for excavation for abutments, wing walls, and piers include all excavation required for the construction of the abutments, wing walls, and piers for the bridges and underpasses, except piers Nos. 3 and 4 for the Sacramento River bridge, second crossing. Excavation for the abutments, wing walls and piers will be measured for payment to lateral dimensions one foot outside of the foundations of the structures and to side slopes of 1 to 1 for common excavation and ¼ to 1 for rock excavation: *Provided* That, where the character of the material cut into is such that it can be trimmed to the required lines of the concrete structure and the concrete placed against the sides of the excavation without the use of intervening forms, payment will be made only for the excavation within the neat lines of the structure: *Provided further*, That, for any structure where, in the opinion of the contracting officer, the conditions warrant, the excavation will be measured for payment to the most practicable dimensions and lines as staked out or otherwise established by the contracting officer * * *.

4. Plaintiff's claim is for payment for the materials lying between slopes of one to one for common excavation and of one-fourth to one for rock excavation and the slopes as actually excavated. Plaintiff was paid for such excavation at the unit price bid in the schedule for excavation to the grades as excavated. The contracting officer never staked out or indicated, except as herein shown, the slopes to which excavation was to extend. Plaintiff actually excavated to nearly perpendicular lines.

5. At the beginning of the work the contracting officer first indicated the location and dimensions of the wall that was to be built by proper stakes, and the center line of the work was likewise indicated. No slopes were staked out by or under the direction of the contracting officer, and no written or verbal instructions as to slopes were given to plaintiff by the contracting officer in advance of excavation. However, with the contracting officer's knowledge, plaintiff, in the exercise of his own discretion, excavated to much steeper slopes than one to one for common excavation, and one-quarter to one for rock excavation. Plaintiff made no

formal protest on account of the lack of slope stakes, nor did this delay plaintiff in the performance of his work.

6. During the progress of the work, payment on monthly estimates was made to the approximate excavation lines. Plaintiff did not file written requests with the contracting officer within ten days after the receipt of monthly estimates asking for the quantities and classifications of excavation included in the estimates. Plaintiff did, however, protest verbally as to the method by which excavation was measured for payment, and was advised by the defendant that payment would be made on the basis of the slopes as excavated.

7. Paragraph 37 of the Specifications, General Conditions, provided:

> 37. *Classification of excavation.*—Except as otherwise provided in these specifications, all material moved in required excavations for the structures will be measured in excavation only to the neat lines shown on the drawings or prescribed by the contracting officer and will be classified for payment as follows:
>
> *Rock excavation.*—All solid rock in place which can not be removed until loosened by blasting, barring, or wedging and all boulders or detached pieces of solid rock more than one-half cubic yard in volume. Solid rock under this class, as distinguished from soft or disintegrated rock under common excavation, which also requires blasting before removal, is defined as sound rock of such hardness and texture that it cannot be loosened, or broken down by hand drifting picks. No material, except boulders or detached pieces of solid rock, will be classified as rock excavation which is not actually loosened by blasting before removal, unless blasting is prohibited and barring, wedging, or similar methods are prescribed by written order of the contracting officer.
>
> *Common excavation.*—All material other than rock excavation, including, but not restricted to, earth, gravel, and also such hard and compact material as hardpan, cemented gravel, and soft or disintegrated rock, which cannot be removed efficiently by team-drawn scrapers or excavating machinery until loosened by blasting, also all boulders or detached pieces of solid rock not exceeding one-half cubic yard in volume.
>
> No additional allowance above the unit prices bid in the schedules for excavation of materials will be made on account of any of the materials being wet or frozen.

It is desired that the contractor or the contractor's representative be present during the measurement of materials excavated. On written request of the contractor, made within 10 days after the receipt of any monthly estimate a statement of the quantities and classifications of excavation for any part of the work included in said estimate will be furnished to the contractor within 10 days after the receipt of such request. The statement will be considered as satisfactory to the contractor unless specific written objections thereto, with reasons therefor, are filed with the contracting officer within 10 days after receipt of said statement by the contractor or the contractor's representative on the work. Failure to file such written objections, with reasons therefor, within said 10 days shall be considered a waiver of all claims based on alleged erroneous estimates of quantities or incorrect classification of materials for the work covered by such statement.

8. The following comparison of quantities and amounts shows the quantities excavated, the amounts paid, and the amounts claimed by the plaintiff under schedules one and two of the contract:

Schedule No. 1

	Common	Rock	Value
As excavated	13,895 c. y.	2,270 c. y.	$19,570
As paid	16,760 "	2,831 "	23,838
¼ and 1:1 slopes	33,625 "	4,570 "	45,040

Schedule No. 2

	Common	Rock	Value
As excavated	6,080 c. y.	2,330 c. y.*	$10,740
As paid	7,047 "	2,250 "	11,448
¼ and 1:1 slopes	7,765 "	2,500 "	12,765

*91 c. y. rock over-excavation abutment 2 not allowed in estimate.

Plaintiff claims the difference between the amounts paid, and the amounts as calculated on the basis of a one to one slope for common excavation and a one-quarter to one slope for rock excavation, or a total of $22,419.00.

There is no dispute between the parties as to schedule 3 of the contract.

9. Plaintiff protested the measurement of excavations for pay purposes after the completion of the work as set forth

in finding 2 herein, and filed a claim identical with his present claim as shown in finding 8.

Plaintiff's claim was rejected by the contracting officer and plaintiff duly appealed to the head of the department, who affirmed the rejection of plaintiff's claim and the findings of the contracting officer.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff, an individual, contracted with the Government to construct abutments, piers, and underpasses on certain United States highways in California. For excavation, plaintiff was to be paid at specified rates per cubic yard. Paragraph 39 of the specifications, of the contract, quoted in finding 3, provided that, for purposes of payment for excavation, measurement would be made to side slopes of one to one for common excavation and one quarter to one for rock excavation:

> *Provided* That, where the character of the material cut into is such that it can be trimmed to the required lines of the concrete structure and the concrete placed against the sides of the excavation without the use of intervening forms, payment will be made only for the excavation within the neat lines of the structure: *Provided further*, That, for any structure where, in the opinion of the contracting officer, the conditions warrant, the excavation will be measured for payment to the most practicable dimensions and lines as staked out or otherwise established by the contracting officer * * *.

When plaintiff commenced work the contracting officer staked out the center line and the dimensions of the proposed concrete structures, but did not stake out the excavation slopes, nor give plaintiff any instructions as to the slopes. Plaintiff made no request for stakes or instructions and, of his own motion, excavated to much steeper slopes than the ones named in the specifications. During the progress of the work payments were made to plaintiff on monthly estimates of work accomplished. These estimates were made by the contracting officer approximately upon the basis of the amount of excavation actually done by the plain-

tiff, that is, upon the basis of the steep slopes, and not upon the basis of the slopes named in the specifications. The plaintiff protested verbally to the contracting officer against this method of computing the yardage for payment. He was told that his payments would be for amounts actually excavated, and having been so told, continued with the work and completed it.

Paragraph 37 of the specifications is quoted in finding 7. Plaintiff made no written request for a statement pursuant to paragraph 37, and, of course, received no statement and filed no written objections such as are mentioned in that paragraph.

When plaintiff had completed the work he filed a claim with the contracting officer for the difference between the payments made on the basis of the contracting officer's measurements, and the amounts that would have been due had the contracting officer measured on the basis of the slopes named in the specifications. The contracting officer denied the claim. The plaintiff appealed to the head of the department, who affirmed the contracting officer's decision.

The plaintiff claims that according to the contract he was entitled to be paid on the basis of the slopes of one to one for common excavation, and one quarter to one for rock excavation, as named in the specifications, since the contracting officer did not bring the situation within the proviso of paragraph 39 by staking out or otherwise establishing dimensions and lines different from the ones specifically named.

The defendant urges that the contracting officer, by using actual excavation to steep slopes as the basis for his measurement for monthly estimates, did "otherwise establish" a basis of measurement for payment within the meaning of the specifications; that the specifications did not require that the different basis of measurement for payment should be established before any of the work was done.

We agree with the defendant's contention on this point. We think that the slopes stated in the specifications were principally intended to be maximum slopes beyond which, if the plaintiff exceeded them, he could not collect pay for the excess unless the contracting officer authorized the excess. We think that the Government did not contemplate paying

for unnecessary excavation, and that when it was discovered that the condition of the soil was such that steep slopes would stand and would not involve any increased collateral costs or dangers, it would have expected the contracting officer to establish such slopes as the payment slopes. The contracting officer did, in effect, so establish them by adopting them as the basis of measurement for the monthly payments, and by answering plaintiff's protests with a statement that the Government would continue to pay on that basis. He thereby notified plaintiff that steep slopes, such as plaintiff had, on his own motion, begun to cut, and which had proved satisfactory, were the slopes which would be used for payment. He thereby "established" the method by which the excavations would be measured for payment. Since the plaintiff was paid on that basis, he cannot recover more.

It might be urged that the contracting officer did not establish the basis for payment which was used in compensating plaintiff until after the plaintiff had been at work for the first month of the time spent in the performance of the contract, since his method of measuring the excavations for payment was not brought to the plaintiff's attention until the contracting officer made his monthly estimate of work accomplished. But no showing has been made as to how much, or what kind, of excavation was done during that first month, so that we would have no basis for determining how much plaintiff should receive, if we were of the opinion that the basis of payment for the first month should be the one which plaintiff contends for for the entire operation.

In view of what we have said, it is unnecessary for us to decide whether the Government's other defenses, viz., that plaintiff is barred because he did not pursue the contract procedure of filing a written request and written objections as specified in paragraph 37 of the specifications, quoted in finding 7, and that the decision of the head of the department adverse to plaintiff was final, are meritorious.

Plaintiff's petition will be dismissed.

It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

CHARLES S. LOBINGIER v. THE UNITED STATES

[No. 45824. Decided December 6, 1943. Plaintiff's motion for new trial overruled February 7, 1944]

On Demurrer

Civilian employee of Government transferred to new official station not entitled to expenses of packing, crating and drayage of household goods unless and until transported.—Under the act of October 10, 1940, and the applicable regulations issued thereunder, providing for the payment of expenses incurred by Government employee for the "packing, crating, drayage and transportation of household goods and personal effects" of such employee when transferred from one official station to another for permanent duty, it is *held* that recovery cannot be had for the expense of "packing, crating and drayage" unless and until such household goods are actually "transported" to the new official station.

Mr. Charles S. Lobingier pro se.

Mr. Frank J. Keating, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The facts sufficiently appear from the opinion of the court.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff's petition, which, the defendant says, fails to state a cause of action, alleges the following facts. The plaintiff is an officer of the Federal Securities and Exchange Commission. His official station was, until March 1942, Washington, D. C., which was also the main office of the Commission. The main office of the Commission was at that time transferred to Philadelphia, Pennsylvania, as a part of the process of decentralizing the Government. On March 5, 1942, the plaintiff was directed to proceed to Philadelphia on or about March 16, 1942, to be permanently stationed there. To facilitate the decentralization process, Congress had, on October 10, 1940, 54 Stat. 1105, U. S. C., Title 5, § 73c–1, provided for the payment of—

> Expenses which now or hereafter may be authorized by law to be paid from Government funds for the packing, crating, drayage, and transportation of household goods and personal effects of civilian officers and employees of any of the executive departments or establishments of the United States when transferred

from one official station to another for permanent duty, * * *

Pursuant to the statute, and the Commission's order to proceed to Philadelphia, the plaintiff, with the approval of the Chief of the Commission's Budget and Accounting Section, employed the Merchants' Transfer and Storage Company, whose bid was the lowest, to perform the "packing, crating, and drayage" of his "household goods and personal effects," for which that company rendered a bill of $127.50. The goods were by the plaintiff's direction drayed to the storage house of the company, preparatory to their transportation to Philadelphia after plaintiff had arrived there and found a suitable apartment.

On April 7, 1942, the President of the United States issued Executive Order No. 9122, of which Section 12 is as follows:

> All shipments allowable under these regulations shall begin within six months of the effective date of the transfer of the employee unless an extension is specifically granted by the head of the department or establishment. Such an extension shall be approved by the head of the department or establishment within the six months' period during which shipment would otherwise begin and shall in no case be for a period exceeding two years from the effective date of the transfer.

On September 9, 1942, the Chairman of the Commission approved plaintiff's request for an extension such as was authorized by the President's Executive Order, giving plaintiff until March 16, 1944, for the transportation of his "household goods and effects" to Philadelphia. Plaintiff has been seeking a suitable apartment in Philadelphia but has been unable, as yet, to find one. Plaintiff presented the bill of the Merchants' Transfer and Storage Company to the Federal Works Agency (Public Buildings Administration), which had charge of such matters. That agency refused to pay the bill but later referred the question to the Comptroller General, who affirmed the refusal. The plaintiff, in order to prevent the sale of his goods by the Merchants' Company for the unpaid charges, paid the bill of $127.50 and now sues the United States for that amount.

The defendant demurs to the plaintiff's petition on the ground that, as it contends, an employee is not entitled to be

paid the expense of packing, crating, and draying his goods unless they are transported to the new official station. The plaintiff contends that the words, "packing, crating, drayage, and transportation" as used in the statute describe four separate kinds of reimbursable expenses, and that an employee, having incurred, as plaintiff has, three of the named kinds of expense, need not wait for reimbursement until he has incurred the fourth, viz, transportation.

In support of its contention that expenses such as those for which plaintiff seeks recovery were intended to be paid only when they were incurred as an incident to transportation, the defendant points to several facts claimed by it to be indicative of that meaning. The title to the Act of October 10, 1940, is—

> An Act To provide for uniformity of allowances for the transportation of household goods of civilian officers and employees when transferred from one official station to another for permanent duty.

The Senate and House Reports on the bill, No. 1591 and No. 1947, 76th Congress, 3d Session, both contain the statement that the bill is the result of a recommendation of the Comptroller General. They say:

> The Comptroller General recommends that legislation be enacted to establish uniformity of allowances for the transportation of household goods and personal effects of civilian officers and employees when transferred from one official station to another for permanent duty.

The President's executive order, dated November 7, 1940, had the following heading:

> EXECUTIVE ORDER NO. 8588
>
> Prescribing Regulations Governing the Payment of Expenses of Transportation of Household Goods and Personal Effects of Certain Civilian Officers and Employees of the United States.

Section 4, a part of Section 5, and Section 11 of that order were as follows:

> SECTION 4. *Allowances for Drayage.*—The actual costs of drayage to and from the common carrier shall be allowed: *Provided*, That in no case shall costs of drayage

> be allowed where door-to-door common-carrier rates are applicable.
>
> SECTION 5. *Means of Shipment.*—Shipment shall be made by the most economical means, taking into consideration the costs of packing, crating, drayage, unpacking, and uncrating. * * *
>
> SECTION 11. *Shipment from Point Other than Last Official Station.*—The expenses of transportation allowable hereunder shall be payable whether the shipment is from the last official station of the employee to the new one, or from some previous place of residence of the employee to the new official station, or partially from both: *Provided*, That the expenses payable shall in no case exceed the costs of shipment by the most economical route from the last official station to the new: *And provided further*, That no expenses shall be allowable for the transportation of property acquired en route from the last official station to the new.

As to Sections 5 and 11 of these regulations, the Government urges that it would not be possible to ascertain whether and how much crating and drayage were compatible with "the most economical means of transportation" when in fact transportation to the new station was not intended to follow the preliminary steps. In fact, it is likely that hardly any crating, and no drayage at all, would be done in connection with transportation from Washington to Philadelphia, since the transportation could, probably, be most economically done by a door-to-door motor van.

Plaintiff urges that the requirement in the regulations that "shipment shall be made by the most economical means" was not intended to, and could not, if it had been intended to do so, deprive an employee of the right to have his goods packed, crated, and drayed, at Government expense, since those rights were conferred by the applicable statute. We disagree. We think that for an employee to have his furniture crated, or drayed to a warehouse or elsewhere, when in fact it could be shipped most economically by being placed directly into a moving van from the employee's home, would be nothing but waste which, we think, the statute did not compel the administrative officers of the Government to reimburse from public funds.

Plaintiff urges the hardship of being compelled to wait a long time for his reimbursement for the part of his moving

expenses already incurred, since he has the privilege of making his move at any time up to March 16, 1944. We recognize the hardship, but we think plaintiff has oversimplified the problem. We think it is entirely possible that some of the expenses already incurred may not be reimbursable at all, when and if plaintiff completes his move to Philadelphia, and all the facts relating to "shipment * * * by the most economical means" are known. We refer to the costs of crating and drayage, already discussed.

We conclude that the Public Buildings Administration and the Comptroller General, who in the course of their duties encountered the statute before we did, were not unreasonable in interpreting it as being primarily intended to reimburse employees for the transportation of their property to a new station, and as including the other elements of expense when they were incurred in connection with transportation. We think that the right to separate reimbursement for the separate items mentioned in the statute would create such confusion and possible waste that it may not be supposed to have been intended by Congress, in the absence of statutory language clearly so stating. We think that the language of the statute does not clearly so state.

The defendant's demurrer is sustained and the plaintiff's petition is dismissed.

It is so ordered.

Littleton, *Judge*; and Whaley, *Chief Justice*, concur.

WHITAKER, *Judge*, dissenting:

The main purpose of the Act was to reimburse a civilian employee for his expenses incident to his transfer from one official station to another, that is, the designated expenses in connection with his household goods and personal effects. If an employee be transferred from one official station to another and is unable to transport his household goods and personal effects to the new station because he can find there no habitation in which he can use them, but if he has incurred as a result of his transfer any of the expenses designated in the Act in connection with taking care of them, it

would seem that it was the purpose of Congress to reimburse him therefor.

Had plaintiff had his goods packed and crated and hauled to a transportation company and this company had carried them to Philadelphia, and thereafter plaintiff had discovered that he could find no habitation in which to use them and, therefore, had been forced to store them in Philadelphia, it would seem to be beyond question that he would have been entitled to recover the value of the packing and crating and the drayage of them as well as the cost of the transportation of them. If, on the other hand, he took the precaution of seeing whether or not he could find a place in his new location where he could use his goods before incurring the expenses of moving them there, and while doing so he was compelled to put them in storage, and if it later turned out that he could not find a place where he could use them, it would seem he would be entitled to the named expenses incurred in having them cared for at his old station, provided only such expenses do not exceed the cost of the packing, crating, drayage, and transportation of them to his new official station. I cannot ascribe to Congress an intention to make transportation a prerequisite to reimbursement for expenses incurred, however foolish such transportation would have been.

But the defendant says that plaintiff is unable to recover by reason of the provisions of sections 1 and 3 of Executive Order No. 9122, amending sections 5 and 11 of Executive Order No. 8588, both of which were issued under authority of the Act of October 10, 1940 (54 Stat. 1105; Title 5 U. S. C. 73c–1). Section 5, as amended, provides:

> Shipment shall be by the most economical means, taking into consideration the cost of packing, crating, drayage, unpacking, and uncrating: * * *

The defendant says that the most economical means of shipping these goods to Philadelphia undoubtedly would be by motor van and that usually packing, crating, and drayage are not necessary when so shipped. Such facts do not appear from the petition and the case is before us on demurrer. Whether or not this is so, we are not informed.

It may be that packing, crating, and drayage are necessary whether shipped by motor van or not, or it may be that less packing and crating and drayage is necessary when shipped by motor van than when shipped by rail or water. These things are matters of proof and cannot be raised on demurrer.

But even if it did appear that no packing, crating, and drayage was necessary when shipped by motor van, still, under the first proviso of section 5 of the President's Executive order, as amended, it would seem plaintiff would be entitled to recover the expense of packing, crating, and drayage necessary for any sort of transportation, provided the cost thereof did not exceed the cost of transportation by the most economical method, and of such packing, crating, and drayage as was necessary when so transported. This proviso reads:

> *Provided*, *however*, That the employee may have his effects moved by some means other than that determined to be most economical by paying the difference between the lowest available charges and the charges by the preferred means: * * *

In a case discussed in 5 Comp. Gen. 229, an Army officer was transferred from Norfolk to Washington. Prior to his transfer he had stored his household goods in Washington, the place to which he was transferred. There was no transportation incident to his transfer, but the Comptroller General nevertheless allowed him the cost of drayage from the place of storage at his new station to his residence, provided the cost thereof did not exceed the cost of packing, crating, and transportation from the old to the new station. This was a perfectly sensible ruling and should be the guide for the decision in this case.

I think the plaintiff is entitled to recover for the cost of packing, crating, and drayage of his household goods from his residence in Washington to the place of storage in Washington, provided the cost thereof does not exceed the cost of such packing, crating, and drayage and the cost of transportation to Philadelphia by the most economical means.

JONES, *Judge*, took no part in the decision of this case.

THE NORTHWESTERN BANDS OF SHOSHONE INDIANS v. THE UNITED STATES

[No. M-107. Decided January 3, 1944]

On the Proofs

Indian claims; treaty of July 30, 1863.—Under the opinion of the court, March 2, 1942, 95 C. Cls. 642, holding that plaintiff bands were entitled under Article 3 of the Treaty of July 30, 1863, to recover $10,804.17, subject to deduction of offsets, if any, under the terms of section 3 of the Jurisdictional Act (45 Stat. 1407), which offsets, if any, were reserved for determination as provided in Rule 39 (a) of the Court of Claims; and upon a stipulation of the facts by the parties with reference to certain items of gratuitous expenditures by defendant for the benefit of plaintiff bands, totaling $10,816.48, which items were found to be proper offsets under the terms of the Jurisdictional Act; it is *held* that, since such offsets exceed the amount which the court had found to be due to plaintiff bands by defendant, plaintiffs were not entitled to a judgment against the defendant.

The Reporter's statement of the case:

Mr. Ernest L. Wilkinson and *Mr. Herman J. Galloway* for the plaintiffs.

Mr. Charles J. Kappler, *Mr. Frank K. Nebeker*, and *Mr. Clinton D. Vernon* were on the brief.

Mr. George T. Stormont, with whom was *Mr. Assistant Attorney General Norman N. Littell*, for the defendant.

Mr. Raymond T. Nagle was on the brief.

This case is now before the court on accounting under Rule 39 (a) for additional findings of fact and final judgment with reference to proper offsets, under the jurisdictional act, against plaintiff bands, with respect to the amount of $10,-804.17 found by the court to be due plaintiffs in the findings of fact (finding 25) and opinion promulgated March 2, 1942. (See 95 C. Cls. 642.)

The court, having made the foregoing introductory statement, entered additional special findings of fact, as follows:

1. During the period from July 1, 1863, to June 30, 1878, the United States expended gratuitously out of its public funds for the use and benefit of the plaintiff bands the follow-

ing specific sums for the following purposes as shown, among other expenditures, on page 44 of the accounting report of the Comptroller General filed as evidence herein:

Livestock	$525.00
Pay of Interpreters	64.40
Provisions and other rations	2,277.95
Transportation, etc., of supplies	6,614.12
	9,481.47

During the period from July 1, 1863, to June 30, 1878, the United States expended gratuitously out of its public funds for the use and benefit of the plaintiff bands jointly with other Shoshones the following sums for the following purposes only, as shown on page 45 of the Comptroller General's accounting report filed as evidence herein:

Medical attention	$280.00
Provisions and other rations	601.34
Repairing guns	937.11
Transportation, etc., of supplies	851.56
	2,670.01

One-half of said sum of $2,670.01, to wit, $1,335.01, was expended for the benefit of the plaintiff bands.

2. The specific amounts of gratuitous expenditures made by defendant on behalf and for the benefit of the plaintiff bands as set forth in the preceding finding have been agreed upon and stipulated by the parties as proper offsets against the amount of $10,804.17 heretofore found by the court to be due plaintiff bands by defendant.

Upon the foregoing additional findings of fact and the findings of fact made and promulgated March 2, 1942, which were made a part of the judgment herein, the court decided that plaintiff bands were not entitled to a judgment against the defendant and the petition was accordingly dismissed.

LITTLETON, *Judge*, delivered the opinion of the court.

Upon a stipulation of facts filed by the parties with reference to certain items of gratuitous expenditures by defendant on behalf of plaintiff bands, which expenditures are disclosed in an accounting report of the Comptroller General filed as evidence herein, the court has made additional find-

ings with reference to offsets, as required by the jurisdictional act, to the extent necessary by reason of the finding and decision of March 2, 1942, that defendant owed plaintiff bands the sum of $10,804.17.

The parties hereto stipulate and agree and the court now holds that in the event of further litigation between the parties, either in this suit or under the present or a similar jurisdictional act, the finding of the specific amounts of offsets herein, totaling $10,816.48, shall not operate for or against the assertion by defendant, as proper offsets against any judgment recovered by plaintiff bands, of other items of disbursement, including expenditures of the same kind or quality as those set forth in the finding herein, made by defendant for the benefit of the plaintiff bands.

The total of the specific offsets found herein to be proper offsets under the terms of the jurisdictional act exceed the amount which the court has found to be due plaintiff bands by defendant. Plaintiffs are, therefore, not entitled to a judgment against the defendant and the petition is dismissed. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

KNOWLTON BROTHERS v. THE UNITED STATES

[No. 43989. Decided January 3, 1944]

On the Proofs

Income tax; reduction in inventory valuation claimed by reason of obsolescence.—Where certain items included at cost in plaintiff's closing inventory for the taxable year 1932 were subsequently sold at a loss in the following taxable year; and where plaintiff claimed that said items had become obsolete during the taxable year 1932 and thus required a reduction of its inventory at the end of that year; it is *held* that it has not been shown by sufficient proof that these items became obsolete in the taxable year 1932 or that plaintiff's income was overstated in its tax return for that year and plaintiff is accordingly not entitled to recover. (Revenue Act of 1932; 47 Stat. 169.)

The Reporter's statement of the case:

Mr. John C. Boland for the plaintiff.

Mr. John A. Rees, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a New York corporation with its principal office and place of business in Watertown, New York, where it is engaged in the manufacture and sale of paper.

2. Plaintiff duly filed Federal income tax returns for the fiscal years ended June 30, 1931, 1932, and 1933. Its return for the taxable year 1931 reported a tax due of $6,328.91 which was thereafter assessed and paid and is not in controversy. Its return for the taxable year 1933 reported a loss of $58,858.95 and no tax due. Its return for the taxable year 1932 was filed September 13, 1932, and reported a total tax liability of $3,525.42 which was thereafter timely assessed and paid in quarterly installments as follows:

September 13, 1932	$881.36
December 13, 1932	881.36
March 17, 1933	881.36
June 15, 1933	881.34

3. After an examination by a revenue agent a deficiency was determined for the fiscal year ended June 30, 1932, of $875.49 on account of the disallowance of a deduction of a stock loss of $6,800 claimed in the return. After appropriate assessment of that deficiency with interest of $116.97, plaintiff paid the total amount, $992.46, December 19, 1934. The adjustment which resulted in the determination of this deficiency and interest is not in controversy in this proceeding.

4. In its return for the fiscal year ended June 30, 1931, plaintiff showed a closing inventory as of June 30, 1931, of $238,487.57 and that the basis of valuation of its inventory was "cost." However, the basis of valuation of that inventory was "cost or market, whichever is lower." Its inven-

tories for prior years were likewise on the basis of "cost or market, whichever is lower" and these were accepted by the Treasury Department for income tax purposes without change. The return for the fiscal year ended June 30, 1932, showed an opening inventory of $238,487.57, the same amount as shown for the closing inventory for the preceding fiscal year, and a closing inventory of $185,222.18, which was shown as the opening inventory for the fiscal year ended June 30, 1933. The basis of valuation of its inventory for the fiscal year ended June 30, 1932, was "cost or market, whichever is lower."

5. In its computation of its closing inventory for the taxable year ended June 30, 1931, and its opening inventory for the taxable year beginning July 1, 1931, of $238,487.57, referred to in the preceding finding, plaintiff included certain items of merchandise at cost in the amounts of $11,327.14, $8,988.96, and $10,658.58. The exact kinds, quantities, and separate costs of these goods on hand at June 30, 1931, were as follows:

	Quantity (pounds)	Cost	
GAY HEAD COVERS			
Rough	120,072	$8,789.27	
Finished	30,211	2,537.87	
			$11,327.14
CIRCLE K MIMEO			
Goldenrod:			
Rough	4,905	182.40	
Finished	13,500	871.24	
Buff, Blue, Pink:			
Rough	10,516	532.03	
Finished	34,528	2,575.78	
White P grade:			
Rough	10,135	590.30	
Finished	34,986	2,302.32	
White PP grade:			
Rough	12,095	700.30	
Finished	16,866	1,234.59	
			8,988.96
RAVENNA TEXT			
Rough	59,442	4,293.58	
Finished	59,347	6,365.00	
			10,658.58
			30,974.68

Plaintiff likewise had on hand kinds and quantities of the same types of paper at June 30, 1932, which were included in its inventory at that date of $185,222.18 at cost figures of

$9,679.27, $7,933.96, and $9,416.82, such cost figures being set out in detail as follows:

	Quantity (pounds)	Cost	
GAY HEAD COVERS			
Rough	99,546	$7,167.31	
Finished	27,510	2,511.96	
			$9,679.27
CIRCLE K MIMEO			
Goldenrod:			
Rough	6,725	388.31	
Finished	11,520	755.33	
Buff, Blue, Pink:			
Rough	15,276	853.93	
Finished	31,472	2,187.87	
White P grade:			
Rough	15,100	816.57	
Finished	18,825	1,237.67	
White PP grade:			
Rough	18,739	1,054.94	
Finished	10,939	639.34	
			7,933.96
RAVENNA TEXT			
Rough	62,670	4,611.17	
Finished	45,598	4,805.65	
			9,416.82
			27,030.05

6. Changes during the taxable year ended June 30, 1932, in the three inventory items referred to in the preceding finding, including increases resulting from manufacture and decreases resulting from sales together with subsequent transactions are itemized in a separate schedule which was filed as Joint Exhibit 2 and which is incorporated herein by reference.

7. The three classes of paper referred to above may be described as follows:

"Gay Head Covers" was a heavy grade of thick paper designed to be used as outside covers for pamphlets and was made in a variety of colors and weights. It was capable of taking colored inks and printing and was sold in blank sheets. "Circle K Mimeo" was a mimeograph paper which was also manufactured in different colors. "Ravenna Text" was a paper of better quality than ordinary book paper. It was designed and used for the reading portion of books, and was manufactured in white and about a half dozen colors.

8. The inventory items, as set out in finding 5, are segregated between "rough" and "finished" stock. The former

represents paper as it comes off the machines, whereas the latter represents the paper after it has been cut into different sizes ready for shipment. The rough stock was kept in rolls and the only additional operation required to make the finished stock was the cutting of the paper to the required sizes. Only the finished stock inventory was offered for sale and the sales referred to in finding 10 represent sales of the finished stock inventory.

9. Plaintiff had been manufacturing the three grades of paper in controversy for some years, varying from five to fifteen years prior to June 30, 1932. Plaintiff continued the manufacture of the "Gay Head Cover" paper until February 1932. In the taxable year in question it manufactured $545.97 worth of this paper. It continued the manufacture of the Circle K Mimeo paper and of the Ravenna Text paper until April 1932. During the taxable year it manufactured $10,497.96 worth of the Circle K Mimeo paper, and $4,781.82 worth of the Ravenna Text paper.

The only market for these papers on June 30, 1932, was in very limited quantities and that condition existed at least from March 1931 until the papers were disposed of in September and October 1932. There is no proof that the market for these papers was any different at the close of the taxable year from what it was prior to the beginning of the taxable year. There is no proof that the papers became obsolete within the taxable year.

10. Sometime between June 30 and September or October 1932, plaintiff determined to dispose of these three grades of paper at the best price available and accordingly made intensive efforts to accomplish that purpose. As a result the Gay Head Covers and Circle K Mimeo papers were sold in September and October 1932 at 3 cents per pound and the Ravenna Text at 4⅛ cents per pound, which represented the best prices plaintiff was able to obtain at that time. These sales included not only the finished stock inventory which was on hand at June 30 but also the rough stock inventory, the latter having been finished for the purpose

of these sales and the prices were for the goods in the finished condition. Plaintiff did not thereafter manufacture these grades of paper.

As heretofore shown, these three items were included in the inventory of June 30, 1932, at cost figures of $9,679.27, $7,933.96, and $9,416.82, respectively, that is a total of $27,030.05, and these cost figures were divided between cost and finished goods as shown in finding 5. The value of these items at June 30, 1932 (exclusive of 14,404 pounds in the first item of a cost of $1,045.61 which was not involved in these sales), if computed on the basis of the amount realized therefor in the sales referred to above by applying those prices per pound to the poundage on hand at June 30, 1932, without regard to whether rough or finished inventory is involved would be $3,379.56, $3,857.88, and $4,466.06, respectively, that is a total of $11,703.50. The difference between the two total amounts ($27,030.05 and $11,703.50) less the portion of the first item of a cost value of $1,045.61 referred to above on which no reduction is claimed, that is, $14,280.94, is the reduction in the closing inventory for the fiscal year ended June 30, 1932, and the reduction in net income which plaintiff seeks in this proceeding.

11. September 12, 1934, plaintiff filed a claim for refund for the fiscal year ended June 30, 1932, of $2,693.73 in which adjustments in income were requested on account of prepaid advertising, charges to reserves for depreciation, advances to salesmen, and a decrease in the closing inventory at June 30, 1932, of $15,963.18. After an examination by a revenue agent, the Commissioner determined an overassessment of $638.46 on account of the first three items in the claim but disallowed the item relating to the inventory adjustment. On the basis of that determination of an overassessment, there was refunded to plaintiff $638.46 together with interest of $85.30 paid December 19, 1934, and statutory interest of $62.35. Except for the allowances shown in the certificate of overassessment, the claim for refund was rejected by the Commissioner and plaintiff so advised by registered letter dated June 18, 1936.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff seeks recovery of income taxes alleged to have been overpaid because it says it overvalued its closing inventory for the fiscal year ending June 30, 1932. Its inventories were taken on the basis of "cost or market, whichever is lower." In its closing inventory for the taxable year, it included certain items at their cost price. It says, however, that these articles had become obsolete during the taxable year and that their actual selling price was much below cost and, therefore, under the regulations of the Treasury Department it was entitled to value them at their actual selling price rather than cost.

The defendant says, first, that there is no proof that these articles became obsolete within the taxable year, and, second, that if they were obsolete at the close of the year they were equally obsolete at the beginning of the year and, hence, if their value at the end of the year is to be adjusted, so also is their value at the beginning of the year, and that one adjustment offsets the other.

The articles in question were certain types of paper. R. W. McCormick, who was plaintiff's Vice President in charge of sales, was asked the question, "Whether on or about June 30, 1932, there was any market at all for this paper." He replied, "I would say there was an extremely limited market—I wouldn't say that there was any market at all because papers of this type always sell in limited quantities." He also said that this was also the situation in March 1931, June 1931, September 1931, December 1931, January 1932, March 1932, and on up to October 1932.

James C. McCormick, the father of R. W. McCormick, and plaintiff's treasurer, said "the three grades of paper were so dead that they smelled, and had been for a long time, and except for the vanity of the sales manager who was there then they would have been disposed of, took so long to get his vanity under control. It was known over a number of years to all of us that these lines were dying and officially dead."

The three articles in question were the Gay Head Cover paper, the Circle K Mimeo paper, and the Ravenna Text paper. During the taxable year plaintiff manufactured

a negligible quantity of the Gay Head Cover paper, but manufactured a considerable amount of the Circle K Mimeo paper and also the Ravenna Text paper. It manufactured about 8,000 pounds of the Gay Head Cover paper at a cost of about $545. The total cost of the Circle K Mimeo paper manufactured during the year was about $10,000, and the total cost of the Ravenna Text paper manufactured during the year was about $5,000. The opening inventory was $30,974.68.

It appears, therefore, that during the taxable year plaintiff manufactured about half as much of these papers as it had on hand at the beginning of the year. It continued the manufacture of the Ravenna Text paper and the Circle K Mimeo paper until April 1932 and of the Gay Head Cover paper until February 1932. This refutes J. C. McCormick's statement that these papers had been dead for a number of years. Plaintiff would not have continued to manufacture a paper which it knew was obsolete and could not be sold. J. C. McCormick says that they continued to manufacture these papers to appease the vanity of their sales manager who believed in them. But this statement is so contrary to business experience that it cannot be relied upon. Some of plaintiff's officers may have thought the papers were dead, but the parties in control of the business did not think so because they continued to manufacture them.

We must, therefore, take it as true that the papers were not obsolete as late as February and April 1932; and plaintiff points to no event occurring between these dates and June 30, 1932, that caused the value of the papers to decline. On the contrary, when plaintiff came to take its closing inventory it continued to value them at their cost price, although it had the right to value them at their actual selling price if in the meantime they had in fact become obsolete.

But if we accept as true J. C. McCormick's statement that the papers had been dead for a number of years, then it would follow that whatever adjustment should have been made in the closing inventory should have also been made

in the opening inventory and one adjustment would offset the other.

R. W. McCormick says that there was only a limited market for the papers on June 30, 1932, but he also says the same condition existed throughout the taxable year and indeed in March 1931, prior to the beginning of the taxable year. If this is so, then whatever adjustment should be made in the inventory at the close of the taxable year should also be made in the opening inventory of the taxable year, and one adjustment would offset the other.

We are of opinion that plaintiff has not shown that these papers became obsolete during the taxable year. Therefore, under the proof it is not entitled to any adjustment in its cost of goods sold and, therefore, it has not shown that its income has been overstated.

It results that plaintiff's petition must be dismissed. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

CONNOR & RIPSTRA, CO-PARTNERS v. THE UNITED STATES

[No. 44740. Decided January 3, 1944]

On the Proofs

Government contract; extra pay for extra work.—1. Where contractor seeks to recover for the extra costs incurred by it in excavating work, in the performance of a contract providing for lump sum compensation, and for extra payment, the amount of which was to be adjusted, pursuant to the contract, for excavating rock as defined in the contract; and where plaintiff was paid an extra amount for excavating rock, based on an investigation, carefully and systematically made, by the defendant's superintendent of construction; it is *held*, on the basis of all the evidence, including the evidence produced by plaintiff, that plaintiff has received as much extra compensation as it was entitled to under the contract and is not entitled to recover more.

Same; decision of contracting officer.—2. Where plaintiff took no appeal from the contracting officer's decision denying compensation for repairing steam line which plaintiff damaged with its excavating machine; the decision of the contracting officer, under the terms of the contract, became final.

The Reporter's statement of the case:

Mr. Warren E. Miller for the plaintiff.

Mr. Milton Kramer, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

Mr. Brice Toole was on the brief.

The court made special findings of fact as follows:

1. Connor & Ripstra, designated in the petition as plaintiff, was a partnership which was engaged in the general contracting business, specializing in plumbing and heating, and other work incident thereto. The partnership has been dissolved, and J. G. Ripstra, one of the partners, has succeeded to any rights or claims the partnership had in the matters involved in this suit.

2. March 20, 1933, the partnership entered into a contract with the defendant through the Acting Commissioner of Indian Affairs to "furnish all labor and materials, and perform all work required for the complete construction of a central heating plant, including all equipment, and underground distribution system, with final connections to all buildings to be served by this plant, at the Sequoyah Training School, Tahlequah, Oklahoma, * * *" in accordance with specifications, schedules, and drawings which were made a part of the contract. The original contract price was $55,994, which was increased by change orders in the net amount of $2,000.78, making the total consideration $57,994.78. Plaintiff received notice to proceed with the work on June 10, 1933. The contract called for completion of the project on October 8, 1933. It was completed without assessment of liquidated damages.

3. One item of work required to be carried out under the contract was the construction of a concrete tunnel approximately 5 feet wide, 6 feet high, and 1,800 feet long. In order to construct this tunnel, it was necessary for plaintiff to excavate a trench approximately 10.31 feet deep. The

total material excavated therefrom in preparing the trench was approximately 5,100 cubic yards.

4. Among the provisions in the specifications with respect to the payment for excavating rock in the event it was encountered in carrying out the work were the following:

> Should rock, within the definition of these specifications, be encountered, it will be paid for as an extra as hereinafter specified; but the Contractor will excavate earth and such other material as may be encountered at his expense.
>
> * * * * *
>
> Should rock be encountered within the limits of the required excavations, payment for removal of same will be made subject to such adjustment as is provided by Articles 3 and 4 of the contract. Only solid ledgerock or rock which can not be removed with the pick or wedge, or boulders exceeding 12 cubic feet in bulk, shall be considered as rock. All rough or sloping rock shall be brought to level beds in steps for foundations as required.
>
> * * * * *
>
> * * * Rock which can be removed by the use of tools and without blasting shall not be considered solid rock, and will not be paid for as rock excavation. Rock which can not be so removed, but requires blasting, will be paid for as an extra. Measurements for such rock excavation will be confined to the specified depth of trench, and no extra width. Excavation quantities less than one cubic foot will not be considered.

5. The Sequoyah Training School where this work was performed is located in an area of Oklahoma where a rock formation known as "Boone chert" is frequently encountered. It varies in thickness from one foot or less up to 300 feet. Outcroppings of this material appear on the surface at places in that area, but usually it is underground, the distance underground being determined largely by the amount of erosion which has taken place on the surface. At the site where the trench referred to in finding 3 was excavated, no ledge of the material appeared above the surface of the ground, and the material as a compact mass was generally not encountered until after earth or loose material had been removed to a depth of four or five feet, though evidence

of its existence at that place was readily apparent from outcroppings in the immediate vicinity.

Boone chert is a very hard material, being sometimes referred to as flint; it will scratch glass and steel. It is cemented together in irregular fashion by silica and clay, and does not exist in layers such as are commonly found in limestone. Checks and small seams are found in the mass. The material is not only very hard, but also very brittle. Exposure to the elements causes gradual disintegration of the mass of material by reason of the manner in which it is held together, and freezing and thawing cause a separation at the seams and the breaking of the brittle material. The practical means of loosening it is to strike in the seams or checks with a pick, wedge, or point. The use of excavating machines in removing this material is both uneconomical and impractical.

6. The specifications which were made available to prospective bidders, including plaintiff, contained the following provision:

> VISIT TO SITE. Bidders should take such steps as necessary to fully inform themselves as to the location of the site, and as to the conditions under which the work is to be done. They should take such levels and surveys as they deem necessary to check the elevations and grades indicated on the drawings, as the Indian Office assumes no responsibility as to the correctness of the same.

Prior to submitting its bid, plaintiff made a surface examination of the site, but made no examination of subsurface conditions.

7. Plaintiff began excavating the material for the trench with a machine known as a back hole excavator. This was a machine on caterpillar treads from which projected a boom, which had attached to it a second boom, on the end of which was a bucket or shovel. Both booms were movable, and the bucket operated by scraping toward the machine from the place where it was lowered. That machine was used throughout the entire period of the excavation and, in addition, plaintiff brought a second machine of similar type on the job three or four weeks before the completion of the contract. Both machines were rented by plaintiff.

8. Shortly after plaintiff began excavating on June 21, 1933, and on that date, plaintiff encountered the Boone chert material, and when encountered, Ripstra, one of the partners, notified the defendant's inspector that the material was solid ledge rock, and that plaintiff should be allowed extra compensation for excavating it. After an investigation, the inspector advised Ripstra that since the material could be removed with a pick or wedge, it could not be considered ledge rock. Ripstra then telegraphed the Commissioner of Indian Affairs in Washington, D. C., stating that solid ledge rock had been encountered, and asking that someone from the Commissioner's office make an inspection. The Commissioner of Indian Affairs thereupon sent a man to inspect the work who, after examining the material being excavated, and after consulting with Ripstra, stated that the material could be removed with picks and points, and refused to classify it as solid ledge rock as defined in the specifications.

9. Plaintiff continued its excavation work with the machines hereinbefore described, but under serious difficulties, primarily because it was attempting to excavate the Boone chert with a machine that was not adapted for that purpose. It carried on the work by causing the bucket of the excavator to drop on the hard material and break it. While it was able to break the material in this manner, it caused serious damage to the machines, breaking the buckets, booms, and other parts of the machines. So serious was the damage to the first machine, which was in good operating condition at the time it was brought on the job, that it has been of little or no use since that time. The other excavator, which was in poor condition when obtained, was likewise seriously damaged. The owner of the first machine filed a claim against plaintiff for $2,160 on account of excessive damage to the machine in this operation. Plaintiff, however, has not paid the amount, but did agree with the owner that it would pay that amount, less 20 percent, in the event it was recovered in this suit. Not only were these machines not designed for use in the manner in which they were used on this job, but the owners of the machines would not have permitted that use had they been aware of it.

Plaintiff filed a claim with the Commissioner of Indian Affairs for excessive depreciation on the first machine of $2,160, and on the second machine of $834, plus 10 percent overhead and 10 percent profit and bond premium, making a total claim of $3,677.91. The Commissioner of Indian Affairs forwarded the claim to the Comptroller General, who disallowed it on the ground that any such damage was due to an error of judgment on the part of plaintiff in using machinery for a purpose for which it was not designed or adapted, and that the Government could not be held liable for damages so incurred.

10. Plaintiff completed the excavation of the trench with the two excavators referred to in the preceding findings, except as to material which the excavators could not remove. It attempted to remove this more difficult material by the use of an air hammer, but abandoned that as impractical. An effort was also made to use dynamite, but this was also abandoned where it was necessary to drill the rock. The most practical means for removing this hard material was with picks, sledges, and points. Plaintiff found that while the material was very hard, it was also very brittle, and would break or split off when these tools were properly applied to it.

11. During the period when it was carrying out its excavation, plaintiff continued to protest the failure of defendant's representatives to classify the hard material as ledge rock, and defendant's representatives consistently adhered to their decision that since the rock could be removed by means of picks or wedges, extra compensation for its removal could not be allowed.

Plaintiff filed with the Commissioner of Indian Affairs various requests for extra compensation on account of what it considered solid ledge rock within the meaning of the specifications, the first being filed July 1, 1933, and the last March 5, 1934. The first request was for nine cubic yards of rock excavation at $7.00 per cubic yard, plus overhead and profit. The total of all claims was approximately $11,-000. The alleged extra cost per cubic yard varied greatly in the several claims. In view of the difference of opinion which existed between plaintiff and defendant's represent-

atives as to whether the Boone chert material constituted ledge rock, and because this was a lump-sum contract, no accurate measurements of the different types of material were kept by plaintiff other than estimates made by plaintiff from time to time—during a portion of the time daily—of the part of the total material excavated which it considered should be classified as ledge rock. Likewise, no accurate figures were kept of the actual cost of the different types of excavation. In a letter of March 5, 1934, summarizing various proposals or claims which had been filed, plaintiff made the following statements:

> In connection with the excavation on this site, we have always maintained that after we stripped three to four inches of top soil on this institution, we were in rock excavation within the terms of our contract, and the extra expense in connection with same should be paid for in accordance with the specification requirements, and articles 3 and 4 of our contract, as an extra.
>
> *   *   *   *   *
>
> Our total excavation was approximately 5,100 yards. If 50% of this excavation was in solid ledge rock of a particularly hard variety, and it was a particularly hard variety, our proposals total less than $4.00 a yard, and we feel this is a very reasonable figure for the type of excavation we encountered.

In testifying in this proceeding, Ripstra stated the position of plaintiff as follows:

> My opinion is that I should be paid for the rock excavation on that job the difference in my cost between the actual excavation costs and that of a reasonable figure for the cost of removing dirt, loose rock, and other materials, as provided in the specifications, plus 10 percent profit and plus 10 percent overhead.
>
> Q. 455. [BY THE COMMISSIONER] That is, in effect, the claim that you made at the time this matter was presented to the Government, I assume.
>
> A. That is the same as my claim.

In bidding for the contract, plaintiff estimated that an excavating machine could remove the 5,100 cubic yards of material in the trench at the average rate of 100 cubic yards per day, that is, perform this work in 51 days. Since the actual operation required more than twice that length of

time, plaintiff's contention is that it should be paid the difference between the estimated cost of doing the work in 51 days and the actual costs incurred.

12. After receipt of the various claims referred to in the preceding finding, and after considerable correspondence with plaintiff as to the merits of its contention, the Commissioner of Indian Affairs instructed its superintendent of construction to proceed to the site of the work and determine whether the material in question could be removed by pick and wedge, whether it was practical to proceed in that manner, and the cost per cubic yard of making such an excavation. At that time the work had been completed, but the superintendent of construction had test holes dug immediately adjacent to the trench, of the same width and depth as the trench excavated by plaintiff. One of these holes was dug at a place which Ripstra stated was immediately opposite the hardest digging encountered by plaintiff. The two test holes, which were sunk to the same depth and width as the trench in question, were excavated entirely by pick and shovel, and costs were kept of the operation, using the same rate of pay as that paid by plaintiff on its work. The cost in one case was $1.03 per cubic yard, and in the other $1.27 per cubic yard, more difficult digging having been encountered in the second than in the first test hole.

The superintendent of construction dug further test holes, but not of the full depth of the trench, in order to determine the most practical and economical method of excavating this rock, using air hammers, picks, bars, shovels, and by blasting. As a result of the entire investigation, the superintendent of construction reached the conclusion that the most practical and economical method of excavating the rock was by means of blasting, and removing with picks, bars, and shovels, and that the cost by that method was $1.16 per cubic yard. He further found that a fair estimate of the amount of rock which might be classified as solid ledge rock was 1,275 cubic yards.

13. After receipt of the report of the superintendent of construction, the Commissioner of Indian Affairs forwarded plaintiff's various claims to the Comptroller General with

the recommendation for an allowance in accordance with the report of the superintendent of construction. The Comptroller General followed the recommendation of the Commissioner of Indian Affairs, and allowed for 1,275 cubic yards as rock excavation at $1.16 per cubic yard, less previous payments for the same number of cubic yards as earth excavation, plus 10 percent for overhead, and 10 percent profit, making a net amount of $1,041.96. That amount was paid to plaintiff, or to plantiff's bonding company. The record does not establish that a greater amount of rock within the meaning of the specifications was excavated by plaintiff, in carrying out this work, than that for which payment has been made.

Except for the allowance shown above, the Comptroller General denied the various claims.

14. The specifications contained the following provision with respect to "Outside Water and Sewer Services":

> All existing water pipes, steam pipes, electric conduits, sewers, drains, fire hydrants, and other structures, which, in the opinion of the Superintendent of Construction, do not require change of location, shall be carefully supported and protected from injury by the Contractor, and in case of injury, they shall be restored at his expense, to as good condition as that in which they are found.

During the course of operations, plaintiff's excavator hooked into and damaged a temporary steam line which was being maintained by defendant during the period of the construction of the heating plant. The steam line was visible on both sides of a roadway, but was hidden from view where it was located under the roadway. The defendant required plaintiff to repair the damage, and plaintiff filed a claim of $30.85 for making the repairs. The contracting officer denied the claim, and plaintiff took no appeal from that decision.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court: The plaintiff, a partnership, seeks to recover for the extra

costs incurred by it in excavating rock, in the performance of a contract providing for a lump sum compensation, and for extra payment, the amount of which was to be adjusted pursuant to the contract, for excavating rock as defined in the contract. The facts appear in our findings of fact and will not be repeated here.

The plaintiff was paid an extra amount of $1,041.96 for excavating rock. This amount was calculated upon the basis of an investigation made, after the completion of the contract, by the defendant's superintendent of construction, to determine how much rock, as defined in the contract, the plaintiff had excavated, and what was the reasonable cost, per cubic yard, of excavating it. In our opinion, the facts produced by this investigation constitute the most trustworthy evidence as to how much extra compensation plaintiff should have received. The testimony of Mr. Ripstra, one of the partners in the plaintiff's firm, that he estimated that the excavation took twice as long as it should have taken, hardly rises to the dignity of evidence. The other estimates made by the plaintiff were merely estimates, not records, of the materials encountered. The investigation by the defendant's superintendent of construction was, on the other hand, carefully and systematically made. On the basis of all the evidence, we conclude that the plaintiff has already received as much extra compensation as it was entitled to under the contract and may not recover more.

As to the plaintiff's claim for compensation for repairing the steam line which it damaged with its excavating machine, the plaintiff took no appeal from the contracting officer's denial of that claim, and that officer's decision therefore became final. The plaintiff has abandoned its claim for damage to the excavating machines, described in finding 9.

The plaintiff's petition will be dismissed.

It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

EDNA H. KING, TRADING AS THE TIOGA CONTRACTING COMPANY v. THE UNITED STATES

[No. 43554. Decided January 3, 1944]

On the Proofs

Government contract; progress payments; decision of contracting officer.—Where plaintiff entered into a contract with the Government for the remodeling and enlarging of a post office building, providing for monthly partial or progress payments; it is *held* that the proof does not show that defendant breached the contract by failure to make such payments in accordance with the terms of the contract (Article 16) and plaintiff is not entitled to recover.

Same.—The facts show that defendant not only made prompt monthly progress payments as agreed upon and as certified by plaintiff's superintendent and defendant's construction engineer but that such partial payments were liberal under the circumstances.

Same; breach of contract.—Where the contract provided that "no partial payments will be made on work not satisfactorily executed in place;" and where defendant paid the amount computed and asked by plaintiff's superintendent as the payment due for July 1932; it is *held* that there was no breach of the contract by defendant for failure to pay a larger amount covering the installation of new boilers for the heating system which were delivered in July but the installation of which was not completed until later.

Same; temporary heat.—Where the contract provided (paragraph 683 of the specifications) that "the contractor shall provide adequate heating facilities" in the building throughout any heating season during the life of the contract; and where the contractor installed a temporary heating system, which was used during the heating season, it is *held* that the contractor, under the terms of the contract, was required to furnish and pay for fuel for temporary heat during the period of performance of the contract and plaintiff is not entitled to recover for the amount so expended for fuel.

Same; decision of contracting officer.—Where the decision of the contracting officer has substantial support in the language of the contract his decision is final and binding on the contractor, plaintiff, under the provisions of the contract as found in paragraph 38 of the specifications.

The Reporter's statement of the case:

Mr. W. Walton Hendry, for the plaintiff.

Miss Mary K. Fagan, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

Plaintiff brought this suit to recover $2,107.58 as damages in the amounts of $953.28 for alleged breach of Article 16 of the contract in failing to make proper and adequate monthly partial or progress payments, and $1,254.30 for alleged breach of Paragraph 683 of the contract specifications by requiring plaintiff to furnish and pay for fuel for temporary heat during the period of performance of the contract.

The defendant denies that there was any breach of the contract and contends that proper and adequate progress payments were made promptly; that under the terms of the contract plaintiff was required to furnish temporary heat, as the contracting officer decided, and that under Paragraph 38 of the specifications the decision of the contracting officer was final and conclusive on plaintiff.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. The plaintiff, Edna H. King, trading as the Tioga Contracting Company, is a citizen of the United States and at the time the contract was signed, was a resident of the City of Philadelphia, Pennsylvania.

2. June 16, 1932, the plaintiff and the defendant, the latter represented by the Office of the Supervising Architect of the Treasury Department, entered into a written contract whereby the plaintiff, for the consideration of $22,410.00, agreed to furnish all labor and materials and perform all work required for the remodeling, enlarging, mechanical equipment and approach work, including all changes and repairs incident thereto, of the United States Post Office and Court House at Roswell, New Mexico, in strict accordance with the specifications, schedules and drawings, all of which were made a part of the contract. The contract and specifications are in evidence as plaintiff's exhibits 1 and 2, and are made a part hereof by reference.

3. Under date of June 18, 1932, plaintiff and the Indemnity Insurance Company of North America furnished the

performance bond which was approved by the defendant on June 27, 1932. On June 28, 1932, plaintiff received notice to proceed with the work, making the contract date of completion, as duly extended, May 27, 1933.

The work was substantially completed by May 2, 1933, with the exception of a few defects and omissions which were corrected by December 19, 1933. No liquidated damages were assessed.

At the time the plaintiff signed the final voucher, March 14, 1934, it accepted final payment, by check of April 4, 1934, made no protest nor did it reserve the right to make any claims arising under or by virtue of the contract.

4. Plaintiff's husband, W. S. King, was manager of the business and handled the office work from plaintiff's office in Philadelphia. Howard King, plaintiff's son, was superintendent and representative on the job, and he had charge of the construction work at the contract site in Roswell, New Mexico.

5. Article 16 of the contract provided:

> ART. 16. *Payments to contractors.*—(*a*) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer. In preparing estimates the material delivered on the site and preparatory work done may be taken into consideration.
>
> (*b*) In making such partial payments there shall be retained 10 percent on the estimated amount until final completion and acceptance of all work covered by the contract: *Provided, however,* That the contracting officer, at any time after 50 percent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full: *And provided further,* That on completion and acceptance of each separate building, vessel, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made in full, including retained percentages thereon, less authorized deductions.
>
> (*c*) All material and work covered by partial payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the contractor from the sole responsibility for the care and protection of materials and

work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the Government to require the fulfillment of all of the terms of the contract.

(*d*) Upon completion and acceptance of all work required hereunder, the amount due the contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein.

Paragraph 11 of the General Requirements of the Specifications also provided:

> Partial payments on work satisfactorily executed in place will be made monthly on estimates made and approved by the contracting officer. Ten percent of such estimates will be retained until final completion and acceptance of the work. No partial payment will be made on work not satisfactorily executed in place.

6. Soon after plaintiff commenced work on the project, her superintendent, under date of July 21, 1932, forwarded to defendant's construction engineer a schedule of payments for monthly progress reports, being a breakdown of the various items or classes of work involved with a money value placed on each item. The total equaled the contract price. The amount allocated by plaintiff for the heating work was $4,500. This schedule was agreed to by defendant's construction engineer.

7. The amounts certified for the respective monthly partial payments were figured on a basis of percentage of the completed work, or work in place, on the whole contract to the respective dates, and were arrived at by agreement of the defendant's construction engineer with the plaintiff's superintendent at the site of the work and were set forth in detail on monthly progress reports. Vouchers for payment were issued accordingly. These vouchers contain a certificate that "the above bill is correct and just and payment therefor has not been received," and were signed in each instance by plaintiff's superintendent on the job or by plaintiff's manager, as well as by defendant's construction

engineer. Defendant's construction engineer, at plaintiff's request, fixed the date of the month for making partial payments, and also at plaintiff's request made changes in these dates for plaintiff's accommodation.

8. Plaintiff claims that beginning in August and extending through November 1932, the defendant's estimates were insufficient to pay for the work installed by plaintiff, especially the mechanical equipment installed but not tested; that the amount withheld was $3,825.90, which was paid November 25, 1932, and that the withholding of this amount prevented payment to subcontractors and affected delivery of materials.

The monthly progress reports indicate that the work progressed in satisfactory manner during July and August 1932: that during September and October there was insufficient force and that progress was unsatisfactory; also that delivery of materials was unsatisfactory. However, plaintiff's superintendent testified that fairly satisfactory progress was made in carrying on the work until December 1932.

During November 1932 there was improvement in progress, but delivery of materials continued to be slow. The report covered heating $1,200, brickwork $1,200, stonework $550, concrete work $100, structural steel $400, woodwork $300, plastering $50, iron work $86, allowed on bond and insurance $165, gas piping and replacing temporary line to burners $200, being a total of $4,251. The voucher was for the sum of $3,825.90, being the total less retained percentage. This voucher was certified to by the construction engineer and plaintiff's representative as being correct.

9. The following percentage of the work was completed and the payments made from the commencement of the work through October 1932:

1932	Percentage completed	Payment
July	10.22	$2,070.00
August	26.65	3,307.50
September	31.74	1,125.00
October	34.81	673.20
Total		7,175.70

This total included an item for heating amounting to $2,150. These amounts are exclusive of the retained percentage of 10% as called for under the contract.

As of October 26, 1932, the approximate value of the heating work that still remained to be performed amounted to $2,990. At that time, however, the defendant's construction engineer valued this work at $2,350.00 or $640 less, in order to give the plaintiff as large a payment as possible. The heating work which remained to be performed on October 26, 1932, consisted of:

Radiation, 1,000 square feet	$1,000.00
Painting radiators	40.00
Service lines and returns	250.00
Pipe covering	150.00
Boiler covering	100.00
Boiler breeching	100.00
New smokestack	400.00
Oil tank	800.00
Oil connections, from oil tank to oil burners	100.00
Painting oil tank and new smokestack	50.00
Total	2,990.00

10. Plaintiff also claims that it was necessary for her manager to make a trip from Philadelphia to Roswell at considerable expense, in order to adjust the differences with defendant.

Plaintiff's manager is a blind man, and on his trip to Roswell went by automobile, taking his handyman with him to drive. He spent practically the entire month of November at the site of the work. He states that the expenses of this trip, including hotel bills, transportation and salaries for manager and attendant, amounted to approximately $953, comprising car expense $398.28, room and board $60 and $45, salaries $450.

11. Before going to Roswell, plaintiff's manager took up the matter of defendant's estimates with defendant's project engineer in Washington, D. C., with the result that the following telegram, dated October 31, 1932, was sent to defendant's construction engineer, and a copy of it was given to plaintiff's manager:

Work in place regardless of test should be vouchered. Confer with contractor upon his arrival and issue supplementary voucher, Roswell Postoffice.

to which defendant's construction engineer replied on the same date as follows:

Reference office wire dated thirtyfirst. All work in place as of twentysixth Roswell postoffice has been vouchered regardless of tests.

12. When plaintiff's manager arrived at Roswell November 4, 1932, he advised defendant's construction engineer that he needed some money. The clocks for the electric clock system had now arrived and upon the suggestion of the construction engineer that if these clocks were hung he would be able to issue plaintiff a supplemental voucher for the appropriate amount, plaintiff hung the clocks on the walls with nails in a temporary manner. The construction engineer then issued the voucher, dated November 9, 1932, duly signed by Howard King, plaintiff's superintendent for $1,000, less the 10% retained payment, leaving a net amount of $900 for cost of these clocks.

13. The proof is insufficient to establish inaccuracy or irregularity in the progress report and voucher issued for November 1932, or that the defendant's construction engineer withheld funds from the work that was performed in August or September 1932, or that any act of the defendant was the cause of slow work or delay in delivery of material.

The proof is insufficient to prove the reasonableness or accuracy of the amounts charged for expenses of the trip of plaintiff's manager from Philadelphia to Roswell during the month of November 1932.

14. *Claim for gas heat.*—Part of the work involved required the plaintiff to remove the old boilers, breechings, smoke stack, adjacent piping, certain radiators, etc., with a combination oil and gas burner for each boiler.

Paragraph 683 of the specifications also provided:

TEMPORARY HEAT.—Contractor shall provide adequate heating facilities to maintain a temperature of 70 degrees in the building throughout any heating season during the life of this contract; and if he fails to pro-

vide such temporary heat the Government reserves the right to furnish such necessary heat and to deduct the cost of same from any money due the contractor.

Paragraph 38 of the specifications also provided:

> INTERPRETATIONS.—The decision of the contracting officer or his authorized representative as to the proper interpretation of the drawings and specifications shall be final. The Supervising Architect is the duly authorized representative of the contracting officer.

15. On September 28, 1932, the postmaster, who was also the custodian of the post office and court house building, sent the following letter to defendant's construction engineer:

> The Construction Company here have ordered a gas meter installed for this building. I was talking to the manager of the S. W. Public Service Company of this city about the matter, please inform me if it is necessary to have a contract with the S. W. Public Service to furnish gas for this building.
>
> We do not have a gas connection from the main to this building, gas never having been used at this building.

In answer thereto, he received the following reply from defendant's construction engineer, dated September 29, 1932:

> Please refer to your letter of September 28, 1932, relative to the matter of the installation by the contractor of a gas meter, and the necessity of the Government entering into an agreement with the Gas Company.
>
> Please be advised that the action of the contractor in ordering in this meter was on his own responsibility, and at his entire expense. Paragraph 683 of the specifications covering the remodeling, etc., required him to furnish temporary heat and he proposes to use gas for this purpose.
>
> On completion of his work, or on the complete installation of the heating plant when same will be operated by your forces for the sole purpose of heating the occupied building, an agreement can then be entered into with the Gas Company for furnishing gas, if at that time such an agreement appears to be to the best interests of the government.

16. On September 30, 1932, the defendant's construction engineer sent the following letter to the Supervising Architect:

> Please refer to paragraph 683 of specifications covering the remodeling and enlarging of post office and courthouse building at Roswell, N. M.
>
> My interpretation of this paragraph is that the contractor is to supply not only the facilities for heating the building but the fuel also. Temporary heat is being supplied using gas as fuel. Gas has not herebefore been used and the government has never entered into any agreement with the gas company.
>
> However, there is a matter of doubt and it is respectfully requested that the office interpret this paragraph.
>
> Attached hereto is a copy of letter written the Custodian, also his letter regarding same subject.

October 14, 1932, the Supervising Architect answered the above letter as follows:

> Referring to your letter of September 30 relative to interpretations of specifications paragraph #683, temporary heat, you are advised that your interpretation is correct in that the contractor is to furnish heating facilities and temporary heat, and the fuel he uses is his own concern.

The above interpretation was then communicated to the plaintiff by the defendant's construction engineer.

17. Plaintiff's manager claims that the specifications required the contractor to furnish the heating facilities but not the fuel; that if the boiler and heating apparatus had not been permanently installed the plaintiff would have had to put in temporary facilities and it could have used coal, wood, oil or gas for heat; but that the heating system was permanently installed by October 1932, and that no makeshift or temporary facilities were used for supplying heat.

Plaintiff was required under the contract and specifications to install a double heating system for gas and oil. In October 1932 when heat was first needed only a part of the heating system was of permanent installation. These facilities were supplemented by temporary installations to heat the building during the period of alterations. The boilers had been set in place, and the burners had a temporary hook-up to burn gas only. The automatic controls were not installed until May 1933. Gas was used for fuel by the plaintiff, and the boilers were operated manually with the plaintiff turning the gas off when the building was sufficiently heated.

The operation of the system was under the plaintiff's control until final inspection in May 1933 and the final tests were made at that time. These temporary installations were later removed by the plaintiff during the life of the contract and replaced with permanent fixtures and connections. The system was not permanently installed until after the winter season oi 1932–33. Heat was needed by the plaintiff in connection with the work under its contract during the entire heating season of 1932–33.

18. On March 26, 1933, defendant's construction engineer wrote the plaintiff as follows:

> On trip of inspection completed March 25th it was noted that several items remain unfinished or existing defects have not been remedied although they have been repeatedly called to your attention. Your especial attention is directed to the following:
>
> Oil and Gas Burner units: These burners have been installed some months but your steamfitters have been unable to secure satisfactory operation using oil as fuel. It now develops that apparently these burners are piped incorrectly and may require the services of a factory man to correct. Allowances for these burners on previous estimates have been made on the understanding and belief that minor work only was required to secure satisfactory performance. Because of the conditions here stated it is deemed to the best interests of the government that the value of satisfactorily completed work under the subheading "Heating and Ventilating" be revised to $3,700.00 instead of $4,000.00 as heretofore shown.
>
> * * * * *

As a result of this letter, the plaintiff arranged with an oil-burner representative to put the oil and gas burners in operating condition in May 1933. Plaintiff's manager placed in escrow with defendant's construction engineer the amount of money the oil-burner representative charged for fixing the burners and upon the satisfactory completion of the work, the defendant's construction engineer turned the money over to the oil-burner representative. The operation of the heating plant was not turned over to defendant during the heating season of 1932–1933 because it was not completely hooked up; the plaintiff still had considerable work to do on it and it was

turned over to defendant subsequent to the winter season of 1933–34.

19. The bill for the first month's consumption of gas was rendered to the plaintiff and it claimed the bill should have been sent to the Post Office. The bill was then presented for payment to Elza White, Jr., postmaster and custodian of the Roswell Post Office. He immediately advised the gas company that the bill was to be paid by the plaintiff and not the Post Office Department. Thereupon the bill was sent to the plaintiff who refused to pay it. Subsequently, the gas company brought suit against the plaintiff and its bonding company. Later, plaintiff's manager and plaintiff's superintendent offered to pay the gas company 50¢ on the dollar for the gas furnished which was refused by the gas company. The amount of gas furnished to May 12, 1933, was $983.35. The suit was later settled for $954.30, by plaintiff's bonding company. (Petition states the amount as $874.28).

20. On February 4, 1935, more than a year after the work was completed, plaintiff's manager wrote the Treasury Department as follows:

> Referring to our contract for remodeling and enlarging U. S. Post Office and Court House, Roswell, N. M., dated June 16, 1932, final settlement authorized March 16, 1934, will say that:
>
> Southwestern Public Service Co. has entered suit against Tioga Contracting Co. and Indemnity Insurance Co. of North America, surety, for $983.35, with 6% interest thereon from May 12, 1933, for fuel gas used by the Post Office Department during the heating season of 1932. Attached hereto is a copy of their petition.
>
> Inasmuch as our contract did not call for this fuel gas to be furnished by us (and, as a matter of fact, it was consumed for the regular heating of the entire building and not for work done under our contract) we believe that this contractor is not responsible for this gas.
>
> You will note that Par. 683 of the contract provides: "*Temporary Heat.*—Contractor shall provide adequate heating facilities to maintain a temperature of 70 degrees in building throughout any heating season during the life of this contract; and if he fails to provide such temporary heat the Government reserves the right to

furnish such necessary heat and to deduct the cost of same from any money due the contractor."

Heating facilities were furnished by us and we furnished an operator for approximately 180 days, 24-hour service, at a cost to this Company of approximately $730. While we do not know whether or not we are liable for this service, it is submitted for your consideration. We had to use our own operator because the Government's fireman was occupied elsewhere.

However, we respectfully ask that you reimburse us for the above-mentioned case, as follows:

Gas (principal amount)	$983.35
Ten percent for overhead	98.33
Fifteen percent for profit	147.49
Total	1,229.17

21. Defendant's acting supervising engineer answered the foregoing letter on February 27, 1935, by stating:

> This will acknowledge receipt of your letter-claim of January 4, 1935, in total amount of $1,229.17 requesting reimbursement of cost to you of temporary heat furnished during the 1932–33 heating season, while you were doing the extension and remodeling work at the Roswell, New Mexico, Post Office. In view of this contract having been settled as of March 16, 1934, action on your claim of January 4, 1935, is out of the jurisdiction of this office. Therefore, to receive proper consideration in this matter, you should, if you so desire, refer the circumstances to the Comptroller General of the United States at Washington, D. C.

The above letter refers to plaintiff's letter claim of *January* 4, 1935; most likely this is in error—the correct date is February 4, 1935, not January 4, 1935.

On February 27, 1935, plaintiff's manager acknowledged receipt of the above letter from the defendant and asked that plaintiff's claim, together with whatever report or recommendation the Treasury Department desired to make, be forwarded to the Comptroller General's office for decision, inasmuch as the trial between the plaintiff and the Southwestern Public Service Company was set for March 19, 1935. On February 27, 1935, plaintiff's manager also sent the claim to the Comptroller General asking that the Government settle with the plaintiff so the plaintiff could in turn settle

with the Public Service Company and secure dismissal of the suit.

22. The Comptroller General, on July 22, 1935, by letter to the plaintiff, denied the claim, stating:

> * * * It has been reported by the Treasury Department that you completed installation of boilers the latter part of September 1932, and that had you proceeded expeditiously the entire heating plant could have been in normal operation by the beginning of the 1932–1933 heating season, but that due to insufficient finances and labor difficulties you were obliged to rig certain temporary facilities with which you burned gas in the new boilers.
>
> Since the furnishing of temporary heat was clearly one of your obligations under the contract and due to your failure to proceed expeditiously with the repair and installation of the regular heating facilities prevented the Government from operating its heating plant, the Government is under no legal obligation to reimburse you for fuel consumed in complying with your obligation as required by Paragraph 683 of the specifications.

23. The gas meter and the gas for heating the building during the heating season of 1932–33 were supplied by the Southwestern Public Service Company of Roswell, New Mexico, at the request of the plaintiff's superintendent, and the gas was actually turned on and operated by the plaintiff.

The court decided that the plaintiffs were not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court.

Plaintiff seeks to recover the sum of $2,107.58 as damages for alleged breach of contract by defendant. The first claim is that beginning in July and August 1932 defendant breached Article 16 of the contract by failing and refusing to make proper monthly partial or progress payments as required by the contract. For this alleged breach plaintiff claims as damages a total of $953.28 made up of $398.28 representing automobile and personal expenses of plaintiff's manager, W. S. King, and a chauffeur (Mr. King being blind),

from Philadelphia to Washington and return and from Philadelphia to Roswell, New Mexico, the site of the work, and return, and $555 representing salary and other expenses of King and his driver, Joe Di Angelo.

Plaintiff's proof fails to establish that defendant breached Article 16 of the contract, which article and also paragraph 11 of the general requirements of the specifications are quoted in finding 5. The facts as established by the record and as relate to this item of the claim are set forth in findings 6 to 13, inclusive. The facts show that defendant not only made prompt monthly progress payments as agreed upon and certified by plaintiff's superintendent in charge of the work and defendant's construction engineer, but that such partial payments were liberal under the circumstances. The facts further show that early in November 1932 the defendant went to some length and beyond what might have been required of it under the contract, and made plaintiff a supplemental allowance of $1,000 for November, which, less the 10% retained percentage, was promptly paid. The supplemental allowance in November was made because plaintiff was having some financial difficulties and was in need of funds. All partial payments computed and paid were agreed upon and were received without protest other than the visit of plaintiff's manager to defendant's project engineer at Washington in October 1932 for the purpose of ascertaining if there was any way whereby plaintiff could be paid additional amounts on the monthly progress estimates. As a result of this visit the telegrams quoted in finding 11 were exchanged between the defendant and its construction engineer. We cannot find that any action of the defendant in failing to meet its obligations under Article 16 of the contract made it necessary that plaintiff's manager make the trip to Roswell, New Mexico. Plaintiff's progress with the work in September and October had been unsatisfactory. Progress improved in November, probably as a result of the visit of her manager to the site, but plaintiff's delivery of materials continued to be slow.

The contract provided that "No partial payment will be made on work not satisfactorily executed in place". Two new boilers for the heating system to be furnished and in-

stalled by plaintiff cost $3,000 and these boilers were delivered in July and the work of installation was begun. Plaintiff now claims that the sum of $3,000 less 10%, or $2,700 should have been paid on the heating system on the July 30th estimate which was paid early in August, instead of $1,400 which was the amount computed and asked by plaintiff's superintendent in charge of the work and accepted and paid by the contracting officer on approval by his construction engineer. This claim of plaintiff is not supported by the evidence. It is certain that we cannot hold that defendant breached Article 16 of the contract by refusing to make proper progress payments on account of the work done on the heating system when it paid the amount which plaintiff asked.

Plaintiff's claim for the expenses of $953.28 of the trip of her manager to Roswell, New Mexico, must therefore be denied.

The next claim of plaintiff is for damages in the amount of $1,254.30 made up of $954.30 for fuel (gas) for temporary heat as required during the performance of the contract, and $300 for attorney's fee in defending a suit by the company that furnished the gas to provide the heat. Plaintiff furnished the gas connections and ordered a meter installed and when the bill of the gas Company was received by plaintiff for the gas furnished during the first month she requested the Company to render the bill to the Postmaster, the contracting officer in the meantime having decided (findings 15 and 16) that plaintiff was required under its contract to furnish temporary heat. Plaintiff claims here that the contract required her to provide only the facilities for providing adequate heat during the performance of the contract rather than to furnish both facilities and heat. She therefore insists that defendant breached the provisions of the contract contained in Paragraph 683 of the specification and should be required to respond in damages for the cost of fuel for such heat as well as the expense of defending a suit by the supplier of such fuel. The contract provisions pertinent to this claim are set forth in finding 14. The facts relevant thereto are set forth in findings 14 to 23.

We are of opinion that plaintiff is not entitled to recover on this claim. A reading of paragraph 683 of the specifications entitled "temporary heat" shows rather clearly, we think, that plaintiff was to furnish the necessary temporary heat. Therefore payment for the necessary fuel for such heat was her obligation under the contract. This contract provision deals with the furnishing of the necessary temporary heat. There is not a word in it that the defendant is to furnish anything in that connection. The phrase "adequate facilities to maintain a temperature of 70 degrees" had reference to both the facilities and also to the heat to be furnished. This, we think, is made clear by the clause which immediately follows and which states that "if he [she] fails to provide such temporary heat the government reserves the right to furnish such necessary heat and to deduct the cost of same from any money due the contractor." We think plaintiff was not reasonably justified, when making her bid, in interpreting this contract provision as requiring the government rather than the contractor to furnish temporary heat, if it be a fact that she did so interpret it. Plaintiff has submitted no evidence to show that in making her bid she excluded therefrom an estimate for the cost of furnishing temporary heat.

The contracting officer decided October 14, 1932, soon after plaintiff ordered the gas meter installed in the post office building, that under the provisions of paragraph 683, *supra*, the plaintiff was required to furnish fuel and heat. There is substantial support for this decision in the language of the contract and the decision is therefore final and binding on plaintiff under the provisions of paragraph 38 of the specifications. Cf. *Maurice L. Bein* v. *United States*, No. 44619, decided December 6, 1943.

The plaintiff is not entitled to recover and the petition is dismissed. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

CORA WASHINGTON v. THE UNITED STATES

[No. 45637. Decided January 3, 1944]

On the Proofs

Government contract; liability of Government charity hospital to a pay patient for the kidnapping of her child.—It is the general rule that public charity hospitals are not liable to patients for the negligence of their agents even if the patients pay for the service rendered. *Powers* v. *Massachusetts Homeopathic Hospital*, 109 Fed. 294, cited.

Same.—In the instant case it is not to be implied that the hospital agreed to a greater degree of liability than the law imposed on public charity hospitals generally.

Same.—Where the plaintiff's child, born at Freedmen's Hospital, a Government institution, was "surreptitiously and criminally taken" from the hospital and where it is stipulated by the parties that the child was taken "by an unknown person or persons without the permission or knowledge or negligence of any of the Hospital's officers, agents, or employes;" it is *held* that the defendant is not liable in a suit for a breach of contract, and plaintiff is not entitled to recover in a suit for damages.

Same; no liability as insurer.—It cannot be held that in the instant case the hospital agreed to become liable as an insurer.

The Reporter's statement of the case:

Mr. Orille C. Gaudette for the plaintiff.

Mr. Newell A. Clapp, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows, upon the basis of a stipulation of facts entered into by the parties:

1. Freedmen's Hospital, located in Washington, D. C., is operated by and under the jurisdiction of the Federal Security Agency, an agency of The United States, defendant.

2. On October 24, 1941, Cora Washington, an unmarried Negro woman, residing at Catlett, Virginia, and plaintiff herein, was admitted to a private room in Freedmen's Hospital as a pay patient, at the request, and as a patient, of Doctor J. Trigg, a private medical practitioner of Washington, D. C.

3. On October 25, 1941, Cora Washington, while at Freedmen's Hospital, was delivered of a child by the said Doctor

J. Trigg, which said child was thereupon placed in the hospital's nursery for newborn infants.

4. On October 25, 1941, Minnie Washington, plaintiff's nearest relative or friend, paid Freedmen's Hospital the sum of $26.25, and received the following receipt therefor:

FEDERAL SECURITY AGENCY
FREEDMEN'S HOSPITAL

No. 5346 C
OCT. 25, 1941.

Received from Minnie Washington for Cora Washington & Baby on account of Board & Attendance 10/24–30 inc. at 3.25 & .50 Resp. the sum of Twenty Six Dollars & twenty five cts.
$26.25. T. EDWARD JONES,
Director in Chief.

5. On the evening of October 29, 1941, while the Washington baby was in its crib in the nursery of Freedmen's Hospital, it was surreptitiously and criminally taken therefrom, and from the hospital itself, by an unknown person or persons without the permission or knowledge or negligence of any of the hospital's officers, agents, or employees.

6. The Washington baby was never returned to Freedmen's Hospital after it was taken therefrom on October 29, 1941, as aforesaid, and its whereabouts since then has always been, and still is, unknown to the defendant.

7. On November 1, 1941, Cora Washington was discharged from Freedmen's Hospital.

8. While at Freedmen's Hospital, Cora Washington and her child, respectively, were given the usual and customary care and treatment, including board and attendance, by the hospital's officers, agents, and employees.

9. At $3.25 per day, the charge by Freedmen's Hospital for Cora Washington's care and treatment, including her board, attendance and private room, amounted to $26 and, at 50¢ per day for her child, to an additional $2, or a total of $28, of which $1.75 has never been paid Freedmen's Hospital.

10. The aforesaid aggregate charge of $28 represented only a small portion of the cost of the services rendered Cora Washington and her child by Freedmen's Hospital; the bal-

ance of the cost was paid for by the United States as part of its charitable program or plan of assistance to the Negro race.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

The plaintiff alleges that on October 25, 1941, she was admitted to the Freedmen's Hospital in Washington, D. C., as a maternity patient, under a contract whereby the hospital, in consideration of the sum of $26.25, agreed to give her and her unborn baby proper care, maintenance, and attendance and to deliver her baby to her upon her release; that her child was born on the same day she was admitted; but that the hospital had breached its said contract in that it had failed to deliver her baby to her upon discharge and had continued to do. Wherefore, plaintiff sued for $10,000.

A stipulation of facts has been entered into which we have adopted as our findings of fact. It sets out the alleged contract which consists merely of a receipt for the sum paid for her "Board & Attendance"; but plaintiff says in her brief that there was implied an agreement to render her and her baby proper care, maintenance and attendance, and to deliver to her the body of her child upon her release.

If we assume *arguendo* that plaintiff's position is correct, it is nevertheless doubtful whether it is to be implied that the hospital agreed to respond in damages for a breach of its contract, since it was a charitable hospital operated by the United States Government. It is the general rule that public charitable hospitals are not liable to patients for the negligence of their agents, even though the patients pay for the service received. *Powers* v. *Massachusetts Homeopathic Hospital* (1 C. C. A.), 109 Fed. 294; 13 R. C. L. 944 et seq.; and 26 Am. Jur. 594, et seq., and cases there cited. It is not to be implied that this hospital agreed to a greater degree of liability than the law imposed on public hospitals generally.

But even though it is to be implied that defendant agreed to respond in damages for a breach of its contract, still plaintiff

cannot recover, for it is stipulated that the baby was kidnapped from the hospital "without the permission or knowledge or negligence of any of the hospital's officers, agents, or employees". The extent of defendant's implied contractual liability, if any, would be to use reasonable care in its attendance upon the child. If it was without negligence, clearly there is no liability. It certainly cannot be implied that it agreed to become liable as an insurer.

Plaintiff's petition will be dismissed. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

THOMAS EARLE & SONS, INC., A CORPORATION v. THE UNITED STATES

[No. 45015. Decided January 3, 1944]

On the Proofs

Government contract; rejection of claim by Comptroller General; failure of contracting officer to make decision.—1. Where upon presentation to the contracting officer of plaintiff's claim for damages due to delay, plaintiff, contractor, was informed by the contracting officer that the department was unable to pass upon the claim and that it should be submitted to the Comptroller General, which was done, and the claim thereupon was denied by the Comptroller General; and where thereupon the contractor wrote the Secretary, as head of the department, and was again informed that the department did not have jurisdiction but that jurisdiction was vested in the Comptroller General, and that since the Comptroller General had made his decision the department was without authority to take further action; it is *held* that plaintiff lost no rights by a failure to file formal appeal to the head of the department from a "decision" of the contracting officer, in accordance with the provision of the contract providing for such appeal.

Same; disclaimer of jurisdiction.—2. The contracting officer's reply to the contractor, stating that the claim should be presented to the Comptroller General, was not a decision on the merits of the claim but a disclaimer of jurisdiction.

Same; pay for suspension of work.—3. Where, in a contract for repair of a Government pier, it was provided that "should a greater or less number of bearing piles be necessary adjustment in the contract price will be made," this provision in connection with other provisions of the contract would convey to the mind of a bidder the impression that any and all additional costs to him, of whatever character, arising out of the necessity for the placing of additional piles would be paid for, including the cost of the necessary suspension of work pending decision as to contemplated changes in the contract, which changes were subsequently made to the advantage of the Government, and plaintiff is accordingly entitled to recover.

The Reporter's statement of the case:

Mr. Josephus C. Trimble for the plaintiff.

Mr. D. B. MacGuineas, with whom was *Mr. Robert E. Mitchell* and *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows, upon a stipulation of the parties:

1. Plaintiff is a corporation, organized and existing under the laws of the State of Pennsylvania, and has its principal place of business in Philadelphia, Pennsylvania.

2. On the 24th day of October, 1933, plaintiff entered into contract NOy–1945 with the defendant, represented by A. L. Parsons, Chief of the Bureau of Yards and Docks, Navy Department, whereby plaintiff agreed to furnish all labor and materials, and perform all work required for making certain repairs to the Reina Mercedes Pier, at the Naval Academy, Annapolis, Maryland, in strict accordance with Specification No. 7421, General Provisions (forming part of specifications for contracts for public works, Bureau of Yards and Docks, Navy Department, August 1, 1931), and the drawings therein mentioned.

3. Specification No. 7421 contains the following provisions:

SECTION 1. GENERAL CLAUSES.

1–01. *General intention.*—It is the declared and acknowledged intention and meaning to provide and secure repairs to and restoration of a timber pier, complete.

1-02. *General description.*—The work includes the complete removal of all existing timber work of the pier and its landing stages (except piles) and the removal of existing fender and bearing piles as indicated: and the furnishing and installation of all new timber work and piles necessary to restore completely the pier including the removing and reinstallation of existing fittings and the furnishing and installation of new cleats and fastenings.

SECTION 2. PILING.

2-01. *General requirements.*—The work includes the removal of existing wood fender and bearing piles as indicated and specified and furnishing, driving, fitting and all other work necessary to install new piles. In addition to the bearing pile indicated to be renewed, bids shall be based on the renewal of 15 bearing piles 55 feet long and 15 bearing piles 60 feet long from point to cut-off. Should a greater or less number of bearing piles be necessary, adjustment in the contract price will be made in accordance with article 3 of the contract.

The General Provisions forming part of the specifications included the following paragraph:

27. *Adjustments in price and time owing to changes.*—In case of changes as contemplated by article 3 of the contract, the cost thereof, and any change in the time for performance involved shall be estimated by the officer in charge and reported by him to the Chief of the Bureau of Yards and Docks. If his estimate of cost exceeds $500, estimates of cost and time shall be made by a board appointed by or under the direction of the Chief of the Bureau of Yards and Docks, consisting of two officers or other representatives of the Government and one representative nominated by the contractor, which estimates shall be reported to the chief of said bureau. The Chief of the Bureau of Yards and Docks as contracting officer, shall in all cases determine the change, if any, in price and time involved, subject to the right of appeal provided for in article 15 of the contract. In determining the change in price the cost of additions shall be the estimated actual cost to the contractor and the cost of deductions shall be the estimated cost to the contractor as of the time when the contract was made. In arriving at the amount of the change, due allowance shall be made in the discretion of the contracting officer for over-

head and general expense, plant charges, and other expense items of a similar nature. To all estimates of cost 10 percent shall be added for contractor's profit.

4. The contract provided that work should be commenced within 10 calendar days after date of receipt of notice to proceed and be completed within 120 calendar days from said date. Plaintiff received notice to proceed with the work on November 9, 1933, thus fixing the date of completion at March 9, 1934. Plaintiff's equipment and materials began to arrive at the site on January 15, 1934, following which performance of the work was begun.

5. The piling plan accompanying the specifications indicated the renewal and replacement of 36 piles in the pier which were known to be in a damaged condition. Shortly after plaintiff started work it was discovered that marine borers had infested the piling. Plaintiff reported this fact to the officer in charge of the work, who, on January 31, 1934, ordered plaintiff to suspend operations pending an investigation and decision on the action to be taken. An investigation disclosed that all of the piles in the pier had been infested and damaged, and would have to be replaced. Under date of February 14, 1934, the Secretary of the Navy obtained an additional allotment of Public Works Administration funds for such purpose.

6. On February 16, 1934, plaintiff was authorized by defendant to resume the work, and full operations were resumed on February 17, 1934. Performance of the work was suspended from February 2 to February 16, 1934, inclusive, a period of 15 days.

On February 6, 1934, plaintiff addressed the following letter to the defendant's officer in charge:

> Confirming conversation with you on Thursday, February first, and Monday, February 5th, relative to the condition of the present piles in the Reina Mercedes Pier, we are preparing estimates for the changes under the conditions set forth by you at that time. We expect to have these figures in your hands by Wednesday, February 7th, at which time we will discuss the matter with you further and determine on what basis we are to adjust the contract to meet the conditions which have arisen.

As you were advised when we discussed the matter, we are suspending all operations on the work until a definite working arrangement has been reached, and the adjustment under the contract when they are determined will cover the extra cost to us and the necessary extension of time for completion of our work, due to the delays of the work during that period.

The officer in charge replied to plaintiff on February 16, 1934, as follows:

Following the discovery on 31 January, 1934, that the piles of the Reina Mercedes Pier were infested with marine borers to such an extent that it was apparently essential to renew all of the existing piles, it was necessary for you to discontinue all work on the subject contract as of the close of working hours 1 February 1934, pending a decision in the matter by the Government.

Funds for the renewal of all piles of the pier have become available and the conditions under which this additional work will be undertaken will be made the subject of separate correspondence. In accordance, however, with the decision reached at the above referenced conference, at which your Mr. Thomas Earle and your Mr. J. C. Mallory were present, you are hereby directed that in resuming work you proceed with the removal of the existing piles of the inboard bents of the pier starting at the seawall and replacing these piles with the new piles which you have delivered under the subject contract carrying this work as far as the sixty-six new piles on hand will permit.

On February 19, 1934, the same officer wrote plaintiff as follows:

In view of the recently discovered appearance of marine borers in the waters adjacent to the Naval Academy, and the damage therefrom to the piling forming part of the Reina Mercedes Pier, it has been found necessary to replace all of the existing piling of the pier by new piling. Accordingly, as authorized by the Bureau of Yards & Docks, you are hereby directed as a change under the subject contract

"To furnish and drive all necessary piles, to furnish and place all necessary materials and to do all necessary work required in addition to the existing contract to renew all piles of the Reina Mercedes Pier; all as directed by the officer in charge."

The change in contract price and time on account of this additional work will be determined in accordance with Article 3 of the contract and paragraph 27 of the General Provisions forming part of the contract. You are accordingly requested to submit to this office, with as little delay as practicable, the name of the person whom you wish to nominate as your representative on the Board on Changes to be appointed by the Superintendent of the Naval Academy.

7. In accordance with paragraph 27 of the General Provisions forming part of the specifications, the Chief of the Bureau of Yards and Docks authorized the appointment of a Board on Changes consisting of three members, one of whom represented plaintiff. Under date of March 7, 1934, the Board submitted its report containing the following estimate of the cost and time involved in the additional work of removing all piles:

COST OF WORK

MATERIALS	
Piles	$13,147.00
Timber	1,170.00
Necessary iron and steel	250.00
LABOR	
Piles	4,305.50
Placing bolts, dowels, and timber	450.00
PLANT	
Piles	3,379.00
Timber	3,454.00
Field Supervision	504.00
TOTAL ESTIMATED MATERIAL COST	$23,280.50
Profit 10%	2,328.05
Compensation and Liability Insurance	525.95
	$26,134.50
Bond 1%	263.50
TOTAL ESTIMATED INCREASE IN CONTRACT PRICE	$26, 398. 00

ADDITIONAL TIME

Suspension of work pending authorization of additional work	15	calendar days
Awaiting delivery of additional piles	10	" "
Driving additional piles, etc	47	" "
TOTAL TIME EXTENSION	72	" "

The final paragraph of the report of the Board on Changes is as follows:

> The Board in arriving at the foregoing estimated increase in contract price has not considered the added expenses caused the contractor by the necessary suspension by the Government of the original contract work for 15 calendar days pending the determination of the method of procedure and authorization for the additional work covered by this report.

8. On March 9, 1934, plaintiff wrote the defendant's officer in charge as follows:

> Referring to your letter of the 8th instant, Board Report in connection with the above work has been signed as requested in your letter and is returned to you herewith.
>
> We have signed this report with the understanding that doing so will not prejudice our claim for payment of the added expenses caused us by the necessary suspension by the Government of the original contract work for 15 calendar days pending the determination of the method of procedure to be followed under the contract.

By separate letter of the same date plaintiff forwarded its claim to the defendant's officer in charge.

9. The report of the Board on Changes was approved by the contracting officer on March 22, 1934, and on the same day he issued a formal change order to plaintiff, as follows:

> With reference to your contract NOy–1945 (Specification No. 7421), dated October 24, 1933, for making certain repairs to the Reina Mercedes Pier, at the Naval Academy, Annapolis, Md., you are informed that, owing to the following-mentioned change, authorized during the performance of the work under said contract, namely, that you—
>
> "Furnish and drive all necessary piles, furnish and place all necessary materials, and perform all necessary work required in addition to that covered by the original contract to renew all piles of the Reina Mercedes Pier, all as directed by the officer in charge,"
>
> the contract price, pursuant to the provisions of Article 3 of the contract, is hereby increased by the sum of $26,398.00, payable from Account No. 7–03/5640.1, "National Industrial Recovery, Navy, Yards and Docks,

> 1933–1935," subhead No. 69, "Annapolis Naval Academy—Repair Reina Mercedes Pier," (Allotment No. 7–03/5640.1–69–1A). Owing to the foregoing change the time for the completion of the contract is hereby extended seventy-two (72) calendar days, that being the estimated increase in the time required, because of such change, for the performance of the contract.

By reason of this change order the contract completion date became May 20, 1934. Plaintiff completed the work on May 19, 1934, and has been paid in full therefor.

10. As a result of the Government's stop order of January 31, 1934, and the suspension of the work for the fifteen-day period, plaintiff incurred the following expenses:

Demurrage charges on Barge Burgess for 13 days @ $20.00 per day	$260.00
Rental charges on Lighter Helen for 15 days @ $5.00 per day	75.00
Depreciation on Pile Driver 15 days @ $1.55 per day	23.25
Depreciation Koehring Crane 15 days @ $1.76 per day	26.40
Superintendent: 12 days salary @ $8.00 per day	96.00
One man to take care of plant; 12 days @ $4.00 per day	52.00
Additional insurance	11.22
Overhead on labor at 10%	14.80
	$558.67

11. On May 26, 1934, plaintiff executed a release under the contract in favor of defendant, excepting, however, its claim "for expenses incurred due to suspension of the contract work by the Government order."

June 12, 1934, the contracting officer wrote plaintiff as follows:

> Please be advised that inasmuch as your claim is for damage due to delay, the Bureau of Yards and Docks is unable to pass on such a claim, and it should be submitted to the Comptroller General for consideration.

March 13, 1935, plaintiff filed its claim with the Comptroller General. The claim was denied by decision of August 19, 1936, and upon review thereof, at plaintiff's request, that decision was reaffirmed on April 23, 1937.

June 17, 1937, plaintiff addressed a letter to the Secretary of the Navy requesting his advice and assistance in obtaining payment of the claim. July 14, 1937, the Acting Secretary

of the Navy advised plaintiff that jurisdiction over the question of availability of funds for the settlement of claims was vested in the Comptroller General and, in view of his decision, the Navy Department could take no further action in the matter.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiff, a corporation, made a contract with the Government to repair a timber pier at the Naval Academy at Annapolis, for a price of $33,486. A contract drawing indicated that there were 36 piles in the pier which were known to be damaged, and which plaintiff was to replace. The contract also provided that the contract price was based upon the assumption that 30 additional piles would be found defective when the pier was dismantled, and that if it should turn out that a greater or lesser number of piles than 30 should have to be replaced, an "adjustment in the contract price will be made in accordance with Article 3 of the contract."

The contract contained Articles 3 and 4 in the usual form, Article 3 authorizing the contracting officer to make changes in the contract within its general scope, and providing for adjustments in the contract time and price to compensate for such changes, and Article 4 providing that if unforeseen subsurface or latent conditions should be encountered the contracting officer should, after investigation, make such changes in the contract as should be necessary to meet those conditions, and, like Article 3, it provided for adjustments in the contract time and price. Section 27 of the General Provisions of the Specifications provided that if a proposed change under Article 3 involved a cost of more than $500, estimates should be made by a board appointed by the Chief of the Bureau of Yards and Docks, which board should report its estimates to him, who, as contracting officer, should determine the amount of the change in time and price, subject to the right of the contractor to appeal to the head of the department as provided in Article 15. The contract further provided that in such cases the cost of

additions should be the actual estimated cost to the contractor, due allowance being made in the discretion of the contracting officer for overhead and general expense, plant charges, and other expense items of a similar nature, and 10% for profit. Section 2, paragraph 2-01, of the specifications is referred to later herein.

Shortly after the work was started, it was discovered that marine borers had infested and seriously damaged the old piling. The defendant thereupon stopped the work pending its investigation and decision of what should be done. The work remained suspended for 15 days, and the investigation disclosed that all of the piles in the pier would have to be replaced. Then the Government's officer in charge directed the plaintiff to resume work and to remove and replace all the old piles, and advised it that the changes in contract time and price would be determined in accordance with Article 3 and Section 27 referred to above. A board was appointed which submitted to the Chief of the Bureau of Yards and Docks a report estimating $26,398 as the additional cost, including 10% profit, and 72 days as the necessary extension of time, including the 15 days during which the work had been suspended. The report said that it included nothing for the contractor's expenses during those 15 days. Plaintiff wrote its acceptance of the report "with the understanding that doing so will not prejudice" its claims for those expenses, and filed separately a claim for those expenses.

Plaintiff completed the work within the contract time, as extended, and was paid the agreed amount. On June 12, 1934, the contracting officer advised plaintiff that since its claim for expenses during the 15 days of suspension was a claim for damages due to delay, the Bureau of Yards and Docks was unable to pass upon it and it should be submitted to the Comptroller General. Plaintiff thereupon submitted its claim to the Comptroller General, and did not appeal from the decision of the contracting officer to the head of the department. The Comptroller General denied the claim on August 19, 1936, and upon plaintiff's request for a reconsideration, reaffirmed that denial on April 23, 1937. On June 17, 1937, the plaintiff wrote the Secretary of the

Navy, as shown in finding 11, and was advised by the Acting Secretary that jurisdiction over the availability of funds for the settlement of claims was vested in the Comptroller General and that, since that officer had made his decision, the Navy Department could take no further action in the matter.

The Government and the plaintiff agree that the plaintiff was damaged in the amount $558.67, for which plaintiff has not been compensated, by the 15-day suspension of the work in February 1934.

The Government urges that plaintiff's claim may not be considered because it failed to pursue its remedy under the contract in that it did not appeal from the decision of the contracting officer to the head of the department, within the 30 days specified in Article 15 of the contract or at any time. We disagree with this contention. The contracting officer's message of June 12, 1934, was not a decision on the merits of the plaintiff's claim. It was a disclaimer of jurisdiction to decide it under the provisions of the contract, and an unqualified statement that jurisdiction to decide it was in another officer of the Government, wholly outside the Navy Department. If that advice was correct, the plaintiff has lost no rights here by following it. If it was not correct, the plaintiff still has lost no rights as a consequence of being misled by it. The advice was given by the Chief of the Bureau of Yards and Docks, the official in the Department who was held out to the public and the plaintiff as an official competent to bind the Government by committing it to important contracts, and making important decisions in regard to them. If one dealing with the Government could not even safely trust this official's direction as to where to go next, in search of a decision upon his claim in relation to the very contract which this very officer had made with him, he would be hopelessly lost in the mazes of the Government's organization. In fact, as the events showed, if the plaintiff had been so skeptical as to appeal to the head of the department for confirmation of its high official's direction as to where to go next, that advice would have been confirmed. It was in fact confirmed by the Acting Secretary when the plaintiff finally got back to asking his advice,

after it had followed the advice of the contracting officer as to where to go for relief, and had received no relief there. So the Government lost nothing in the way of an opportunity for the Secretary of the Navy to correct an erroneous decision, if it was erroneous, as to where jurisdiction to decide plaintiff's claim lay, or to decide the claim upon its merits, since the Secretary entertained the same erroneous view, if it was erroneous, and would have refused to decide plaintiff's claim on its merits, and would have sent the plaintiff to the Comptroller General, where it already had been sent, and where it in fact went. We think the Government should not lead a contractor through such a maze, and then urge that he has lost his rights because he failed to travel up and back one more dead-end street. We shall consider the plaintiff's case upon its merits.

Upon the merits of the case we think that the plaintiff is entitled to recover. Section 2, paragraph 2–01, of the specifications, as shown in finding 3, specifically enjoins the bidders to base their bids upon the renewal of only thirty piles. It then states "Should a greater or less number of bearing piles be necessary, adjustment in the contract price will be made in accordance with Article 3 of the contract." We think that this provision, written by the Government, would convey to the mind of a bidder the impression that any and all additional costs to him, of whatever character, arising out of the necessity for the placing of additional piles would be paid for. Paragraph 27 of the General Provisions of the specifications, which also appears in finding 3, contains nothing to negative this impression. It says "In determining the change in price, the cost of additions shall be the estimated actual cost to the contractor * * *. In arriving at the amount of the change, due allowance shall be made in the discretion of the contracting officer for overhead and general expense, plant charges, and other expense items of a similar nature."

The final paragraph of the report of the Board on Changes, quoted in finding 7, indicates that it must have regarded the contract as being somewhat ambiguous as to whether the cost of the suspension of the work should be included in the additional amount allowed for the change, under the specifica-

tions. At any rate the Board thought it was necessary to expressly negative any idea that they had made such an allowance.

The contracting officer's letter to the plaintiff, quoted in finding 11, indicated that that official, and probably the Board on Changes, had excluded the cost of the suspension of work from the additional compensation because of some legal distinction which they drew between a claim for damages for delay and an allowance of additional costs resulting from additional time needed to complete the changed contract, after the changes were decided upon. They did allow such additional costs, by way of overhead, for the future performance of the additional work. They seem to have refused to allow the costs of suspension because they regarded such an allowance as beyond their jurisdiction.

As we see it, the only proper distinction which the contracting officer might draw under the contract here in question, would be between, on the one hand, delays, not involving any breach of contract by the Government, but necessary in order that a proper and economical performance of the contract should result, and on the other hand, delays resulting from breaches of contract by the Government, and not necessary to efficient performance. It may be that only the former kinds of delays may be properly compensated for out of an appropriation for a particular project, and that the latter must be made the subject of a separate claim or suit against the Government.

We think the contracting officer was mistaken in classifying the costs of the plaintiff's suspension of work in the latter class. The suspension was necessary and useful to the Government in order to get a good job done. It could have been properly paid out of money appropriated for or allocated to the job. And, as we have said, the Government in the contract, construed as we have construed it, promised to pay such additional costs, and did not, as it frequently does in its contracts, as interpreted, reserve the right to make changes without compensation for the delays involved in arranging for the changes. See *United States* v. *Rice*, *et al.*, 317 U. S. 61.

Syllabus

We conclude, therefore, that the plaintiff was, under its contract, entitled to be compensated for the expenses flowing from the making of the changes here made in the contract, and may recover $558.67.

It is so ordered.

WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

JONES, *Judge*, and WHALEY, *Chief Justice*, took no part in the decision of this case.

LINCOLN COTTON MILL COMPANY, A CORPORATION v. THE UNITED STATES

[No. 45587. Decided January 3, 1944]

On the Proofs

Taxes; unjust enrichment tax; protest and refund demand noted on tax return; statute of limitation.—Notation on tax return "Paid under protest and refund demanded" does not constitute an informal claim for refund which might later be legally amended after the expiration of the limitation statute.

Same.—Where on plaintiff's tax return for the taxable year 1935, filed on February 18, 1937, there was inserted in typewriting the statement "Paid under protest and refund demanded;" and where there is no proof that the Commissioner of Internal Revenue or anyone acting in his behalf ever considered the notation on the 1935 tax return as a proper claim for refund, informal or otherwise; and where, thereafter, on July 12, 1940, plaintiff filed a claim for refund on proper Treasury form, in which no mention was made that a claim, formal or informal, had been previously filed; it is *held* that the action of the Commissioner in rejecting the claim for refund filed on July 12, 1940, on the ground that it had not been filed in time was proper, and plaintiff is not entitled to recover. (Revenue Act of 1936; 49 Stat. 1648, 1731.)

Same.—The notation on the return upon which plaintiff relies as an informal claim for refund lacked the form as well as the certainty necessary under the statute and regulations to constitute an informal claim for refund which might be subsequently amended after the expiration of the statute of limitation. *United States* v. *Andrews, Executrix*, 302 U. S. 517, and other cases cited.

The Reporter's statement of the case:

Mr. Walter E. Barton, for plaintiff.

Mr. John A. Rees, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for defendant. *Mr. Robert N. Anderson* and *Mr. Fred K. Dyar* were on the brief.

Plaintiff seeks to recover $2,566.48 with interest, representing an admitted overpayment of unjust enrichment taxes for 1925. The only question presented is whether plaintiff filed a sufficient claim for refund in time. A formal claim for refund was filed about three years and five months after the completed and final return was filed and the tax paid, but the plaintiff contends that a notation on the return, i. e., "Paid under protest and refund demanded," in connection with the payment of the tax under protest, was a sufficient informal refund claim and that therefore the formal claim for refund subsequently filed, although late, was a proper and legal amendment of such alleged informal claim for refund. This the defendant denies.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is an Indiana corporation with its principal place of business in Evansville. During 1935 and prior thereto, plaintiff was engaged in the business of operating a cotton mill for the purpose of processing cotton.

2. December 16, 1936, plaintiff filed with the Collector of Internal Revenue for the District of Indiana a tentative unjust enrichment tax return for the calendar year 1935 on Treasury Department Form No. 945, which contained no statement of facts or figures, except that in line 7 on the first page of the return following the words "Balance of tax" there was entered the words "Estimated $ None." February 18, 1937 plaintiff filed a completed unjust enrichment tax return for the year 1935 in which it reported in line 7 on page 1 thereof a total tax of $4,087.14 which was paid at the time the return was filed. Line 7, page 1, of said tax return read as follows:

"7. Balance of tax (item 5 minus item 6) * * * PAID UNDER PROTEST AND REFUND DEMANDED ------------------------ $4, 087. 14"

The tax return for 1935 was prepared and filed by Charles N. Brown, who was at that time president and treasurer of plaintiff. Sometime thereafter he died, and consequently there is no proof as to why he inserted the phrase "PAID UNDER PROTEST AND REFUND DEMANDED" in plaintiff's said tax return.

3. In January 1940, Louis M. Frankel, Deputy Collector of Internal Revenue with headquarters in Chicago, Illinois, went to plaintiff's office in Evansville, Indiana, and there audited plaintiff's books relative to its injust enrichment tax return for the year 1935. Frankel spent two or three days going over the books and discussed plaintiff's said tax return with its president, Charles F. Brown, the son of Charles N. Brown mentioned in the preceding finding. Before leaving plaintiff's office, he informed Charles F. Brown that he found no unjust enrichment tax to be due by plaintiff for the year 1935 and that he was going to recommend that the entire amount of unjust enrichment tax paid by plaintiff for 1935 be refunded. Frankel further stated to plaintiff's president that upon his return to Chicago he would complete his report to the Commissioner of Internal Revenue and mail a copy thereof to plaintiff.

At the time Frankel was auditing plaintiff's books for the year 1935, there was pending against plaintiff an assessment of additional income taxes for the year 1935 in the sum of $2,676.18. Frankel recommended to plaintiff's president that this amount be paid inasmuch as the company would receive a refund of unjust enrichment taxes in an amount greater than the sum of said income taxes and interest due thereon. July 13, 1940, plaintiff paid the assessment of additional income taxes in the sum of $2,676.18 plus $694.30 interest thereon, making a total of $3,370.48.

4. February 9, 190, Frankel submitted his report to the Commissioner of Internal Revenue, Washington, D. C., but failed to send a copy of the report to plaintiff. Frankel's report showed an overpayment by plaintiff of unjust enrichment taxes for the year 1935 of $2,881.30 but the report was not approved by the Commissioner.

5. July 12, 1940, plaintiff filed on Treasury Department Form No. 843 a claim for refund of $4,087.14 paid as un-

just enrichment taxes for the year 1935 stating as grounds therefor the following:

> On September 25th, 1939, Deponent executed and submitted to the department Form 872A extending the statutory period as provided therein. During January of the year 1940 Revenue Agent, Mr. Frankel, of the Unjust Enrichment Department, examined our return of Unjust Enrichment Tax for the year 1935, and as result of his examination stated to the Deponent, that he had found no tax to be due for the year 1935, and that he would recommend in his report that the total amount paid of 4087.14 be refunded, account of overpayment. Deponent has not been furnished with copy of Revenue Agent Frankel's report, hence do not know details as to why and how tax was overpaid. In view of Revenue Agent Mr. Frankel's statement, however, Deponent now asks there be refunded to him the Unjust Enrichment Tax erroneously paid for the year 1935 in the sum of 4087.14, plus interest and such other sums as may be legally refundable.

6. September 9, 1940, the Commissioner of Internal Revenue wrote plaintiff that its claim for refund could not be allowed. His letter read in part as follows:

> Section 322 (b) (1) of the Revenue Act of 1936 prohibits the allowance of a refund or credit after three years from the time the return was filed or after two years from the time the tax was paid unless before the expiration of such periods a claim therefor is filed. The records of the Bureau disclose that the return was filed on February 18, 1937 and that the entire tax assessed on your return for the year 1935 was paid on February 18, 1937 and that your claim was filed with the collector of internal revenue for your district on July 12, 1940.
>
> Your claim, therefore, was not filed within the limitation prescribed by law and cannot be allowed. Since no refund or credit is allowable, the issues raised in your claim have not been considered.

October 8, 1940 the Commissioner gave plaintiff formal notice by registered mail that its claim for refund was disallowed in its entirety.

7. In its 1935 unjust enrichment tax return, plaintiff overstated its Federal tax liability and paid taxes thereon in

excess of the amount due in the sum of $2,526.48, instead of $2,881.30 as shown in Frankel's report to the Commissioner.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court.

February 18, 1937, the plaintiff, by and through its president and treasurer Charles N. Brown, prepared and filed a completed unjust enrichment tax return for 1935, on which return, line 7, page 1, thereof, a tax of $4,087.14 was shown to be due and which tax was paid on the same day on which the return was filed with the collector. On the same line of the return on which this tax was computed and shown to be due plaintiff's president inserted in typewriting the statement "Paid under protest and refund demanded." There is no evidence to show the reason why Brown inserted this statement on the return other than that which the words themselves indicate. Nothing further was said or done by plaintiff in connection with the tax shown to be due upon the return and paid until sometime in January 1940 nearly three years later when a revenue agent came to plaintiff's office in Evansville, Indiana, from his headquarters in Chicago, Illinois, to make an examination of plaintiff's books and records, in the usual course of his duties, for the purpose of auditing the return filed. The time for filing a proper and timely claim for refund had not expired at that time in January 1940. While the revenue agent was auditing plaintiff's books and records in January 1940, Charles F. Brown, plaintiff's president at that time (a son of Charles N. Brown), mentioned to the agent the above quoted notation on the return. During his investigation the agent stated to Brown that he found no tax to be due and that he would furnish plaintiff with a copy of his report to the Commissioner. There is no proof that anyone acting for or on behalf of the Commissioner of Internal Revenue had considered or subsequently considered the notation on the return as a proper claim for refund, informal or otherwise.

The revenue agent made his audit report to the Commissioner February 9, 1940, after he had completed his investi-

gation, in which report he recommended an overpayment of $2,881.30. When sending his report to the Commissioner the revenue agent did not send a copy to the plaintiff. This report was not approved by the Commissioner. Thereafter on July 12, 1940, after the expiration of the statutory period for filing a claim for refund, plaintiff filed a claim for refund on Treasury Form 843. No mention was made in this refund claim that an informal claim had previously been filed or that the formal claim filed was intended as an amendment of an informal and inadequate claim for refund made on the return. That question was never brought before the Commissioner and he has never considered it. When the Commissioner came to consider the claim filed July 12, 1940, he rejected it because it had not been filed in time and declined to consider the merits of the claims advanced therein. Prior to the filing of this refund claim on July 12, plaintiff had, on September 25, 1939, within the period during which it could have filed a timely claim for refund, executed and filed with the Commissioner, apparently at the Commissioner's request, a waiver of the statutory period of limitation for assessment and collection of any additional tax that might be found to be due for 1935. We think, in these circumstances, that if plaintiff had actually thought or believed when it filed this waiver that it had overpaid its tax it would also have filed a proper claim for refund at the same time. The most that can be said for the notation on the return is that plaintiff was protesting the payment of the tax shown to be due and hoped that the Commissioner would find no tax to be due when he came to make his final audit of the return. The notation on the return upon which plaintiff relies as an informal claim for refund lacked the form as well as the certainty necessary to satisfy the requirements under the statute and regulations to such an extent as to constitute an informal claim for refund which might subsequently be legally amended after the expiration of the statute of limitation. *United States* v. *Andrews, Executrix*, 302 U. S. 517; *Ritter* v. *United States*, 28 Fed. (2d) 265; *Ross* v. *Commissioner*, 129 Fed. (2d) 310. In these circumstances we do not deem it necessary to discuss the cases cited by plaintiff on the question of the sufficiency and amend-

ments of refund claims. We do not find the cases cited to be in point under the facts of this case.

Refund of the overpayment claimed is barred by the provisions of Section 322 (b) (1) of the Revenue Act of 1936 (49 Stat. 1648, 1731), and the petition must be dismissed. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

MARYLAND CASUALTY COMPANY, A CORPORATION v. THE UNITED STATES

[No. 45659. Decided January 3, 1944]*

On the Proofs

Government contract; right of surety under payment bond to collect balance due on contract as against setoff for taxes.—1. The Government does not have the right to settle the unpaid balance due to a contractor by setting off that balance against a tax debt which the contractor owes to the Government, no tax lien having been perfected, when there is a surety which has been obliged under its payment bond to pay the debts of the contractor for materials and labor used by the contractor in the performance of its contract.

Same; section 3466 of Revised Statutes.—2. The provisions of section 3466, Revised Statutes, giving the United States as a creditor priority over other creditors of an insolvent debtor are applicable in the case of a living debtor only where his insolvency is a formal one, evidenced by a bankruptcy, receivership or assignment for the benefit of creditors. See *United States* v. *State of Oklahoma*, 261 U. S. 253.

Same.—3. In the instant case, the Government had no statutory preference which would give its tax claim priority over the plaintiff's claim as surety.

Same.—4. Where the plaintiff, as surety on a payment bond, paid the debts of its principal, a contractor, for labor and materials, it is entitled to collect so much of the unpaid balance due its principal from the other contracting party as is necessary to make it whole for payments made by plaintiff under its bond. *Globe Indemnity Co.* v. *United States*, 84 C. Cls. 587, distinguished. *Prarie State Bank et al.* v. *United States*, 27 C. Cls. 185, affirmed 164 U. S. 227, cited.

*Defendant's petition for writ of certiorari pending.

Same; general rule as to performance bond.—5. It has been generally held that in the case of the "performance" bond required by the Government of contractors, the money retained by the Government until performance is completed is retained for the purpose of securing performance and the contractor's right to that money upon completion belongs to the surety so far as it is necessary to make him whole and his claim to it has priority over claims of other creditors, including claims of the Government which are unrelated to the contract. *U. S. Fidelity & Guaranty Company* v. *United States*, 92 C. Cls. 144.

Same; intention under payment bond; risks which were not assumed.—6. In the instant case under its payment bond it was not intended by plaintiff and it was not expected by the Government or by the other contracting party, that plaintiff was taking the risk, besides other risks, that any part, or perhaps the whole, of the price which the Government promised to pay upon performance, would be "paid" not in money but by a bookkeeping process of crediting these sums against taxes or other debts of the contractor not related to the contract, to the prejudice of the surety.

Same.—7. The court construes the bond and the transaction as a whole as implying a promise on the part of the Government to the surety that the Government would not so settle the accounts of the contractor as to leave the surety in the position of paying the contractor's taxes, which it had not agreed to pay.

Same; rights of plaintiff not affected by decision of Comptroller General.—8. The fact that the Comptroller General, without knowledge of its effect upon the surety's interest, had set off the balance due under the contract against taxes due to the Government from the contractor, had no final effect upon rights of plaintiff, surety, which is entitled to recover an amount sufficient to make it whole for the amounts paid by it under its bond.

The Reporter's statement of the case:

Mr. John J. Wilson for the plaintiff. *Whiteford, Hart & Carmody*, and *Mr. H. Ellsworth Miller* were on the briefs.

Mr. J. H. Sheppard, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendants. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. The Columbia Foundation Company, Inc., a corporation, entered into a contract with the defendant on or about

February 3, 1940, for the furnishing and installation of a condensing water supply connection at the National Gallery of Art of Washington, D. C. The contract so entered into is described as Federal Works Agency, Public Buildings Administration, contract No. WA–6 pb–510.

2. The contractor was required to furnish a payment bond for the protection of materialmen and laborers, in the sum of $6,725, which this plaintiff executed on or about February 7, 1940, as surety, and it was duly delivered to the defendant by the contractor.

The bond was furnished under the provisions of the Act approved August 24, 1935, 49 Stat. 793.

3. The contractor completed the agreed work June 25, 1940, within the time provided for performance.

4. Before the work was finished the contractor became insolvent and was unable to pay certain sums becoming due by it to laborers and materialmen furnishing labor and material for the job. There have been no receivership or bankruptcy proceedings against the contractor.

Plaintiff made payments under the payment bond to materialmen and laborers, who were left unpaid by the contractor, as follows, all in the year 1941:

Date of payment	*Payee*	*Amount*
Jan. 30	Chapman Valve Mfg. Co	$307.15
Feb. 7	Hawk Welding Co	99.00
Feb. 8	Schroff Bros	168.76
Feb. 8	W. T. Weaver & Sons	3.90
Feb. 18	Vermilyn-Brown Co	49.44
Feb. 19	Maloney Concrete Co	720.16
Mar. 10	Royal Lumber Co	150.78
Mar. 18	Thos. Somerville Co	43.34
Mar. 18	Rosslyn Steel & Cement Co	54.28
Apr. 9	Phillips Machinery Co	135.66
May 26	Nicolo Tenaglia	54.35
May 26	Lorenzo DiPompo	54.35
May 31	Peter J. Ellis	83.16
June 3	Tony Santo	52.57
June 26	District Sand & Gravel Co	7.85
		1,984.75

These payments left no debts of the contractor for labor and materials unpaid.

Plaintiff also on the payment bond paid to the U. S. Collector of Internal Revenue at Philadelphia, Pa., $2.47 June 13, 1941, for Social Security taxes on the foregoing labor items of $244.43 on behalf of the contractor, a total disbursement by the plaintiff of $1,987.22 on the payment bond.

Plaintiff has made no endeavor to obtain reimbursement from the contractor of the amounts so paid, because investigation disclosed that the contractor had no assets.

5. On January 7, 1941, the Comptroller General of the United States, by General Accounting Office certificate of settlement No. 0618907, determined that there was a balance of $4,253.63 due the contractor under its contract, and in this settlement set off the balance of $4,253.63 against Income taxes and Federal Insurance Contribution and Unemployment taxes, due the Government by the contractor, and applied that sum in liquidation of the taxes.

On January 22, 1941, plaintiff protested in writing to the General Accounting Office against this set-off and demanded payment of the balance. A similar protest was filed by the contractor January 23, 1941.

Thereafter plaintiff endeavored to have the Comptroller General rescind his action, and pay plaintiff out of the balance of $4,253.63 the sum of $1,987.22 herein involved. The Comptroller General formally reviewed the claim September 13, 1941, and refused to disturb the settlement.

The General Accounting Office, at the time of making the set-off January 7, 1941, had not been advised that the contractor was financially unable to pay its materialmen and laborers.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff seeks to recover from the United States $1,987.22 which the plaintiff paid to materialmen and laborers whom the Columbia Foundation Company, Inc., failed to pay. Columbia had, about February 3, 1940, made a contract with the United States for the installation of a condensing water supply connection at the National Gallery of Art. It was required by law to furnish two separate bonds, one

guaranteeing its performance of the contract, and the other guaranteeing its payment of materialmen and laborers from whom it might obtain supplies or services in the performance of the contract.[1] The plaintiff furnished the payment bond.

Columbia became financially unable to pay its bills and, when it completed the performance of the contract it left unpaid the materialmen and laborers who were later paid by the plaintiff. On January 7, 1941, which was after completion of performance but before the plaintiff, as surety, had paid Columbia's unpaid bills, the Comptroller General of the United States determined that there was a balance of $4,253.63 of the contract price, which the Government had not paid Columbia, but that Columbia was indebted to the United States in a larger amount than that, for income taxes and federal insurance contribution and unemployment taxes. The Comptroller General applied the balance against the taxes, and gave Columbia a receipt for the payment of that amount on its tax bill. When he did this, the Comptroller General did not know that Columbia had failed to pay its bills, or was unable to do so.

On January 22, 1941, the plaintiff, upon becoming aware of what the Comptroller General had done, protested against the set-off and demanded payment instead of the set-off. Columbia at the same time made a similar protest and demand. The plaintiff then paid Columbia's unpaid debts to materialmen and laborers in the amount of $1,984.75, and social security taxes on the wages paid by it, in the amount of $2.47, making the total amount here sued for $1,987.22. It made no attempt to obtain reimbursement from Columbia because it learned that Columbia had no assets. It sought to have the Comptroller General rescind the set-off, and pay it $1,987.22 out of the $4,253.63 which that official had determined was owing Columbia on its contract, but was used up as a credit on Columbia's unpaid taxes. That official, however, adhered to his former decision and denied the request.

Our question is whether the Government has the right to settle the unpaid balance which it owes a contractor for

[1] Act of August 24, 1935, C. 642; 49 Stat. 793, 40 U. S. C. § 270 (a).

the performance of a certain contract, by setting off that balance against a debt which the contractor owes the Government upon some unrelated account, when there is a surety who has been obliged under its bond to pay debts of the contractor for materials and labor used by the contractor in the performance of its contract. In this case the contractor's debt to the Government was for taxes, but the Government does not claim that it had properly perfected a tax lien, or that the tax debt was different, in any respect material here, from any other debt which the contractor might have owed the Government, as, for example, for supplies sold to him by the Government.

One basis for the Government's asserted defense is that, because of Section 3466 of the Revised Statutes, 31 U. S. C. Sec. 191, the United States, as a creditor, had priority over other creditors of Columbia, and therefore its paying itself by set-off gave it no more than it would have been entitled to in any event. That section is as follows:

> Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

The plaintiff urges that this statute is not applicable except where, in the case of a living debtor, his insolvency is a formal one evidenced by a bankruptcy, receivership, or assignment for the benefit of creditors.

We agree with the plaintiff as to the construction of R. S. 3466. A provision in similar language has been in the statutes since 1797 and has always been construed as plaintiff would have us construe it. See *United States* v. *State of Oklahoma*, 261 U. S. 253. We conclude, therefore, that the Government, as such, had no statutory preference which would give its claim priority over the plaintiff's claim.

We now reach the difficult legal question in the case. The plaintiff claims that as a surety which has paid the debt of its principal, it is entitled to be subrogated to the rights which its principal had, under the contract, including the right to collect so much of the unpaid balance due its principal from the other contracting party as is necessary to make it whole for payments made by it under its bond. The Government, in response, says that there was nothing for the plaintiff to be subrogated to, because Columbia, its principal, had no rights against the United States, since it owed taxes in a larger amount. The Government cites *Globe Indemnity Co.* v. *United States*, 84 C. Cls. 587. In that case the surety sued for the unpaid balance due the contractor from the Government, the surety having there, as here, paid labor and material bills of the contractor. But the contractor's claim against the Government had been forfeited, under the statute, for attempted fraud in the prosecution of it. The court held that the surety could not recover, and said "The party for whose benefit the doctrine of subrogation is exercised can acquire no greater rights than those of the party for whom he is substituted."

We think the *Globe* case was rightly decided. There the principal's claim became literally nonexistent as a result of the forfeiture under the statute, so of course neither the surety nor anyone else could enforce it. But most cases of subrogation, including the one now before us, involve only a question of priority, i. e. whether the surety or some other creditor of the principal has a better right to an admitted asset of the principal. In *Prairie State Bank* v. *United States*, 164 U. S. 227, for example, the question was whether the surety who had expended money to complete the contract upon his principal's default, or the bank which had loaned money to the principal to finance the contract, had the better right to the balance due the principal from the United States, when the contract was completed. In that case, if the bank had had an assignment of the unpaid balance, good as against the principal, the assignor, it and not the principal would have been entitled to collect the money from the United States. But that would have proved nothing as to whether or not still another person, the surety, had a

still better right than the assignee to get the money. So the surety's right by subrogation may give him, as it did in the *Prairie State Bank case*, *supra*, a right to money which, if there had been no surety, the principal would not have been entitled to because he had assigned his right, or had subjected it to a set-off or other valid defense not involving forfeiture of the claim.

A surety is entitled, by subrogation, to priority in valuables pledged by the principal debtor to the other contracting party as additional security for the performance of the contract. Arant on Suretyship, pp. 354, 355. In the case of the "performance" bond required by the Government of contractors, the money retained by the Government until performance is completed is retained for the purpose of securing performance. By proper analogy the contractor's right to that money, upon completion, should belong to the surety, so far as it is necessary to make him whole, and his claim to it should have priority over the claims of other creditors of the contractor, including claims of the Government which are unrelated to the contract. *United States Fidelity and Guaranty Co.* v. *United States*, 92 C. Cls. 144.

The bond involved in the instant case was not a "performance" bond, but a "payment" bond. It is not clear that moneys were withheld from the contractor in order to give the Government additional security that materialmen and laborers would be paid. So far as appears, the balance of the contract price would have been paid to Columbia, if it had not been credited on Columbia's taxes, without any investigation as to whether Columbia had paid its materialmen and laborers. If so, that would indicate that the Government, which would have no more than a moral obligation to see these creditors paid, relies entirely on the payment bond with regard to such debts of the contractor. The analogy of subrogation to additional security may, therefore, not be properly applicable to the type of bond here involved.

The answer to our question should, we think, be looked for in the contract itself and its necessary implications. What did the parties mean? What risks did they intend the surety to undertake? The risks undertaken by a surety, and for

which it receives its compensation, if it is, as the plaintiff is, a commercial surety, include the risk that the contractor, the principal, may receive the payments from the other contracting party, here the Government, and may spend the money in speculation or in riotous living and fail to pay his materialmen and laborers. The surety will then have to pay them. The surety also takes the risk that, by reason of the contractor's bad management, or of a rise in the cost of labor and materials, the payments made to the contractor will not be sufficient to pay the materialmen and laborers. But we do not think that it intends, or is expected by the Government or the other contracting party to take the risk that any part, or perhaps the whole, of the contract price which by the contract the Government promises to pay upon performance, will be "paid," not in money but by a bookkeeping process of crediting these sums against taxes or other debts of the contractor not related to the contract, to the prejudice of the surety.

Suppose a contractor defaults, at some stage, early or late, in performance. The surety elects to complete performance in order to reduce its liability. It secures another contractor and enters into a contract with him for completion of the work. The work is completed. Then the Government says that the original contractor owed it more on other accounts than the unpaid contract price, hence the surety will be paid nothing, though it did some or most of the work covered by the original contract. If, in the same situation, the surety had not elected to complete the work, and the Government had finished the job itself, the surety would have been obliged to pay only the difference between the actual cost of completion and the part of the contract price which had not been paid the original contractor before his default.

In the first situation suggested above, the surety would have paid the original contractor's taxes or other debts to the Government. In the second it would not. We think that in no case is it intended that the surety transaction should work out in such a way that the surety has paid the contractor's taxes or unrelated debts to the Government.

The effect of the contract and the bonds is that the contractor promises the Government that it will build the struc-

ture, *and* will pay the laborers and materialmen. The Government takes two separate bonds to secure the fulfillment of these promises, since its interest in the first is more physical and direct than in the second. But when the surety pays the laborers and materialmen, it is performing the contract as much as when it completes the building. We see no more reason why the parties should intend that, either under the guise of building a building, or of paying laborers and materialmen, both of which the surety has promised will be done, it should in reality, and because of the ease of bookkeeping, be paying the contractor's taxes or other debts, which it has not promised will be done.

We construe the bond and the transaction as a whole as implying a promise on the part of the Government to the surety that it will not so settle the accounts of the contractor as to leave the surety in the position of paying the contractor's taxes. When the Comptroller General was made aware that that was the effect of his accounting, he should have rescinded the set-off. The fact that he had made the set-off without knowledge of its effect upon the surety's interest had no final effect upon the plaintiff's right. The credit given to Columbia on its taxes could have been cancelled, without any prejudicial change in the Government's position. This should have been done when the plaintiff's right became known.

The plaintiff may recover $1,987.22.

It is so ordered.

WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

WHALEY, *Chief Justice*, concurs in the result.

JONES, *Judge*, took no part in the decision of this case.

CASES DECIDED

IN

THE COURT OF CLAIMS

OCTOBER 1, 1943, TO JANUARY 31, 1944

INCLUSIVE, UNDER THE ACT OF JUNE 25, 1938, TO RECOVER INCREASED COSTS IN CONNECTION WITH GOVERNMENT CONTRACTS RESULTING FROM THE ENACTMENT OF THE NATIONAL INDUSTRIAL RECOVERY ADMINISTRATION ACT*

THE KAWNEER COMPANY (A CORPORATION), INDIVIDUALLY, AND AS SUCCESSOR OF THE COLEMAN BRONZE COMPANY, AND COLEMAN BRONZE COMPANY (A CORPORATION), FOR THE USE AND BENEFIT OF THE KAWNEER COMPANY, v. THE UNITED STATES

[No. 44110. Decided October 4, 1943]

On the Proofs

Increased labor costs under National Industrial Recovery Administration Act; claims of merged subsidiary; discretion of Comptroller General under 1934 Act; laches.—Upon the stipulated facts and under the provisions of the Acts of June 16, 1934, and June 25, 1938 (U. S. Code, Title 41, Sections 28–33), claims filed by Kawneer Company under the Act of 1934, individually and as successor of the Coleman Bronze Company, for the increased costs incurred under the subcontracts made by the two companies were valid under the 1934 Act and sufficient to give the Court of Claims jurisdiction to hear and determine said claims under the Act of June 25, 1938.

Same; claim of merged subsidiary not barred by Section 3477 of Revised Statutes.—Where a corporation, through a merger and consolidation, on February 28, 1934, acquired, in exchange for stock, all the property and assets of its wholly-owned subsidiary and assumed all its liabilities, including certain contracts which the subsidiary had partly performed; and where the parent corporation completed the contracts; the right of

* See vol. 92, pp. xxiii–xxix.

the parent-successor corporation to present a claim under the Act of June 16, 1934, for increased costs incurred as the result of the enactment of the National Industrial Recovery Act, under the contracts of the subsidiary prior and subsequent to February 28, 1934, was not barred under Section 3477 of the Revised Statutes under the rule announced and applied in *Seaboard Air Line Railway* v. *United States*, 256 U. S. 655, and *Kingan & Company* v. *United States*, 71 C. Cls. 19.

Same.—The 1934 Act gave completing sureties the right to make claims and receive payments thereon, and it was not intended to deny such right to successors through merger and consolidation.

Same; liberal interpretation of 1934 and 1938 Acts.—The legislative history of the 1934 and 1938 Acts indicates that Congress intended that the proviso of Section 1 of the 1938 Act should receive a liberal rather than a technical construction so as to accomplish the equitable purposes intended by said Acts.

Same; time for presentation of claims.—The 1938 Act enlarged the period during which increased costs incurred under the N. I. R. A. Act could be recovered, and for this enlarged period recovery can be had even if no claim for any period was presented under the 1934 Act.

Same; jurisdiction.—The claims presented by plaintiff were sufficient under the 1934 and 1938 Acts; and it is accordingly *held* that under the provisions of Sections 3 and 4 of the Act of June 16, 1934, proper and sufficient claims were presented to give the Court of Claims jurisdiction of the claim made in the instant suit under the provisions of Section 1 of the Act of June 25, 1938, and that the Kawneer Company is entitled to recover the amount stipulated as the increased labor costs, both direct and indirect, incurred as a result of the National Industrial Recovery Administration Act in the performance of subcontracts made by the Kawneer Company and the Coleman Bronze Company.

Same; discretion of Comptroller General under the 1934 Act; waiver of time limitation on filing claims.—Where, under the 1934 Act, the Comptroller General received, considered and passed upon a claim which showed on its face that it was filed more than 6 months after the prime contract had been completed; it is *held* that the Comptroller General, in effect, extended the time for presentation of the claim, and in any event, having authority so to extend the time, by considering and deciding the claim he waived any objection to late filing thereof which might be urged in the Court of Claims. See *Thompson* v. *United States*, 91 C. Cls. 166; *Callahan Construction Company* v. *United States*, 91 C. Cls. 538.

Same.—Under the express terms of Section 4 of the 1934 Act the Comptroller General was given absolute discretion, where he con-

Reporter's Statement of the Case

sidered there was a good cause for late presentation, to consider and decide a claim filed more than six months after the completion of the contract.

Same.—What constituted good cause was solely for the Comptroller General to decide.

Same; laches.—The 1938 Act provides that judgments, if any, under the Act shall be allowed "upon a fair and equitable basis," notwithstanding the bars or defenses of any alleged laches or any provisions of the 1934 Act. (Section 3.)

Same.—Laches is defined as neglect to do a thing at the proper time.

Same.—Where under Section 4 of the 1934 Act the Comptroller General did not hold that a claim could not "be considered or allowed" because presented late without good cause, the defense of late presentation can not be made in the Court of Claims under Section 3 of the 1938 Act.

The Reporter's statement of the case:

Mr. Prentice E. Edrington for plaintiff.

Mr. Newell A. Clapp, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

This suit was brought by the Kawneer Company individually and as successor of the Coleman Bronze Company, and by the Coleman Bronze Company to the use and benefit of Kawneer Company, to recover $30,093.84 increased labor costs alleged to have been incurred as a result of the enactment of the National Industrial Recovery Act under subcontracts in connection with construction of certain Federal buildings by the United States under prime contracts with persons with whom the Kawneer Company and the Coleman Bronze Company made subcontracts.

The court, having made the foregoing introductory statement, entered special findings of fact as follows, upon a stipulation by the parties:

1. The Kawneer Company is a Michigan corporation engaged in the manufacture of aluminum and bronze metal products used in the construction industry, and maintains its principal office at Niles, Michigan.

2. In May 1930 the Kawneer Company (hereinafter sometimes referred to as Kawneer) acquired by purchase for cash all assets and inventory of the Adelbert E. Coleman Company of Chicago, Illinois (hereinafter sometimes re-

ferred to as the Coleman Company); about the same time Kawneer caused to be organized, under the laws of the State of Delaware, a corporation known as the Coleman Bronze Company (hereinafter sometimes referred to as the Bronze Company), with an authorized capital of 5,000 shares of non-par value stock, and thereupon Kawneer sold and transferred to the Bronze Company, in consideration of the capital stock, all assets which it had previously acquired from the Coleman Company. The 5,000 shares of non-par value stock of the Bronze Company, except for 5 shares used for qualifying directors in said company, were owned by Kawneer. On and after May 1930, the Bronze Company was operated as a separate entity and filed both capital-stock and income-tax returns. The policies of the Bronze Company were formulated by Kawneer and, with the exception of one, the officers of the two companies were the same. Kawneer supplied operating capital and paid certain bills of the Bronze Company during 1930, 1931, 1932, and 1933, and on December 31, 1933, the Bronze Company was indebted to Kawneer for advances in the sum of $137,972.61. At a meeting of the Board of Directors of the Bronze Company held on February 28, 1934, the following resolution was unanimously adopted:

> Whereas, The Kawneer Company owns all of the outstanding stock of Coleman Bronze Company, with the exception of Directors' qualifying shares, and
>
> Whereas, it is considered to the best interest of Coleman Bronze Company to discontinue operating as a separate company.
>
> Now, therefore, be it resolved, that the Coleman Bronze Company sell and convey to The Kawneer Company for due consideration all machinery, tools, stock, equipment, contracts in process, and personal property of every kind or nature owned by it and used by it in its business together with all real estate and improvement thereon which it now owns, and
>
> Be it resolved, that the President and Secretary of the Coleman Bronze Company be authorized, empowered and directed to make, execute and deliver such papers as may be necessary to carry out the intent of this resolution.

On the same day, pursuant to the resolution by written instrument under seal, duly acknowledged, the designated

officers of the Bronze Company for a named consideration of $1 sold and transferred to Kawneer all of the following property:

> All machinery, tools, stock, equipment and contracts in process and personal property of every kind or nature owned by said party of the first part (Coleman Bronze Company) and used by it in its business, belonging to said party of the first part and now in its possession at Chicago, Illinois, and other points, to have and to hold the same unto the said party of the second part (The Kawneer Company), its successors and assigns, forever; and the party of the first part, for its successors and assigns, does covenant and agree to and with said party of the second part, its successors and assigns to warrant and defend the sale of said property, goods and chattels hereby made, unto the said party of the second part, its successors and assigns, against all and every person or persons whatsoever.

In addition to the consideration of $1 named in the above bill of sale of February 28, 1934, Kawneer surrendered for cancellation the 5,000 shares of capital stock of the Bronze Company then owned and held by it and assumed the payment of all the outstanding obligations of the Bronze Company.

To preserve the trade name of the Bronze Company, Kawneer did not immediately cause the dissolution of the Bronze Company. At completion of work on the Bronze Company contracts the respective prime contractors paid the Bronze Company for the work performed. In the two Kawneer contracts the prime contractors paid that concern for the work performed. Shortly after February 28, 1934, there was filed with the Secretary of State of Delaware an application for reduction of the capital stock structure of the Bronze Company to a nominal capital of $1,000 represented by 10 shares of stock held by Kawneer. Capital stock and income tax returns were made by the Bronze Company for the years 1934 to 1938, inclusive, as an inactive corporation. December 21, 1938, the Bronze Company surrendered its charter and was completely dissolved.

After February 28, 1934, Kawneer operated the plant of the Bronze Company at Chicago, Illinois, as the Coleman

Division of The Kawneer Company, and assumed all obligations and paid all debts of the Bronze Company. This action was ratified by a resolution adopted by the Board of Directors of Kawneer on March 4, 1935, as follows:

> Resolved that the action of the officers on February 28, 1934, in exchanging 4,990 shares of no par value common stock of the Coleman Bronze Company for all machinery, tools, stock, equipment, contracts in process and personal property of every kind or nature of the Coleman Bronze Company, subject to all of the liabilities of the Company, be approved and that these items be reflected on the books of The Kawneer Company at the same value as previously carried on the records of the Coleman Bronze Company.

3. All contracts undertaken by the Bronze Company were approved and supervised by Kawneer and at times Kawneer was required to guarantee performance of contracts undertaken by the Bronze Company. The books of the Bronze Company, while kept at its plant in Chicago, Illinois, were under the supervision of the Auditor of Kawneer.

4. November 7, 1932, defendant entered into a contract with the H. G. Christman-Lansing Company for the construction of the Lansing, Michigan, post office. December 10, 1932, the Christman-Lansing Company entered into a written subcontract with plaintiff at a fixed price for all the ornamental bronze and aluminum work required by the prime contract for the post office.

5. April 5, 1933, defendant entered into a contract with Fleisher Engineering and Construction Company for construction of the St. Paul, Minnesota, post office, customs house and courthouse building. March 29, 1933, that company entered into a written subcontract with the Bronze Company at a fixed price for all the ornamental iron, bronze, and stainless steel required by the prime contract; and on March 29, 1933, the Fleisher Company entered into a written subcontract with Kawneer at a fixed price for all aluminum windows required by the prime contract for the post office, customs house, and courthouse building.

6. November 17, 1932, defendant entered into a contract with Consolidated Engineering Company for construction

of the Norfolk, Virginia, post office and courthouse building. January 9, 1933, that company entered into a written subcontract with the Bronze Company at a fixed price for all the ornamental bronze and aluminum work, and aluminum windows required by the prime contract for the post office and courthouse.

7. May 28, 1932, defendant entered into a contract with McCloskey & Company for construction of the Post Office Department building in the District of Columbia. July 15, 1932, McCloskey entered into a written subcontract with the Bronze Company at a fixed price for all ornamental work required for the Post Office Department building.

8. August 3, 1932, defendant entered into a contract with N. P. Severin Company for construction of the Rochester, New York, post office. August 25, 1933, the Severin Company entered into a written subcontract with the Bronze Company, at a fixed price, for the ornamental metal and bronze work required by the contract for the post office.

9. September 30, 1932, defendant entered into a contract with Consolidated Engineering Company for construction of the Cincinnati, Ohio, post office. October 15, 1932, that company entered into a written subcontract with the Bronze Company, at fixed prices, for all ornamental iron, bronze, and aluminum work required by such prime contract.

10. February 28, 1933, defendant entered into a contract with Henry Ericsson Company for construction of the Columbus, Ohio, post office. March 24, 1933, that company entered into a written subcontract with the Bronze Company at fixed prices for all ornamental metal work required by such prime contract.

11. June 27, 1932, defendant entered into a contract with Pike & Cook, Inc., for construction of the Sioux City, Iowa, post office. August 26, 1932, Pike & Cook entered into a written subcontract with the Bronze Company at fixed prices for ornamental metal work, bronze windows, subframes, and spandrels required by such prime contract.

12. The Kawneer Company and the Coleman Bronze Company had not completed their subcontracts as above enumerated on June 16, 1933, when the National Industrial Recovery Act was approved.

13. July 31, 1933, Kawneer and the Bronze Company each signed an agreement with the President, known as the President's Reemployment Agreement authorized by Section 4 (a) of the National Industrial Recovery Act approved June 16, 1933, the pertinent provisions of which were as follows:

> (2) Not to work any accounting, clerical, banking, office, service, or sales employees (except outside salesmen) in any store, office, department, establishment, or public utility, or on any automotive or horse-drawn passenger, express, delivery, or freight service, or in any other place or manner, for more than 40 hours in any 1 week and not to reduce the hours of any store or service operation to below 52 hours in any 1 week, unless such hours were less than 52 hours per week before July 1, 1933, and in the latter case not to reduce such hours at all.
>
> (3) Not to employ any factory or mechanical worker or artisan more than a maximum week of 35 hours until December 31, 1933, but with the right to work a maximum week of 40 hours for any 6 weeks within this period; and not to employ any worker more than 8 hours in any 1 day.
>
> (6) Not to pay any employee of the classes mentioned in paragraph (3) less than 40 cents per hour unless the hourly rate for the same class of work on July 15, 1929, was less than 40 cents per hour, in which latter case not to pay less than the hourly rate on July 15, 1929, and in no event less than 30 cents an hour. It is agreed that this paragraph establishes a guaranteed minimum rate of pay regardless of whether the employee is compensated on the basis of a time rate or on a piecework performance.
>
> (7) Not to reduce the compensation for employment now in excess of the minimum wages hereby agreed to (notwithstanding that the hours worked in such employment may be hereby reduced) and to increase the pay for such employment by an equitable readjustment of all pay schedules.

With the approval and permission of the National Recovery Administration, effective August 25, 1933, Kawneer and the Bronze Company were permitted to substitute the following provisions for paragraphs (2), (3) and (6), respectively, of the previously signed President's Reemployment Agreement:

For paragraph 2 of President's Agreement.

Code reference: (Article II Section 6)

Employees (other than executive, administrative and supervisory employees who are now receiving $35 or more per week; and factory or mechanical workers or artisans, watchmen, outside sales and service men) shall not be employed more than 40 hours per week, provided, however, that they may be employed for one week of 48 hours during each one month's period.

For paragraph 3 of President's Agreement.

Code reference: (Article II, Section 6)

No factory or mechanical worker or artisan (except emergency repair employees and old and partially disabled employees who shall comprise not more than 2% of the total number of employees) shall be employed for more than a 40-hour week provided, however, that these limitations shall not apply to branches of this industry in which seasonal or peak demand or break-down places an unusual and temporary burden upon such branches and provided, however, that in no case shall the hours worked in any one week exceed 48 hours and provided, further, that the number of hours over 40 per week worked in any six months' period shall not exceed 32.

For paragraph 6 of President's Agreement.

Code reference: (Article II, Sections 3, 4, and 7)

No factory or mechanical worker or artisan shall be paid less than 35c per hour for males and 30c per hour for females unless the hourly rate for the same class of work on July 15, 1929, was less than the above specified minima in which latter case they shall be paid not less than 30c per hour for males and 25c per hour for females and provided further, that learners and apprentices may be paid not less than 80% of the above minimum wages for a period of not to exceed three months, but the total number of such learners and apprentices shall not exceed 5% of the total number employed by any such employer in any calendar month, provided, further, however, that where female employees do substantially the same work or perform substantially the same duties as male employees, they shall be paid the same rate of pay as male employees are paid for doing such work or performing such duties. This paragraph establishes a guaranteed minimum rate of pay regardless of whether the employees are compensated on the basis of a time rate or on piece-work performance.

November 12, 1933, Kawneer and the Bronze Company became bound by a Code of Fair Competition for the Fabricated Metal Products Manufacturing and Metal Finishing and Metal Coating Industry, also providing for maximum hours and minimum wages.

From and after July 31, 1933, Kawneer and the Bronze Company substantially complied with and adhered to the agreement with the President, the substituted provisions thereof, and the applicable Code of Fair Competition in the manufacture and production of the materials called for by their respective contracts as above enumerated.

14. In substantially complying with the agreement with the President, as originally signed and as amended by the substituted provisions, and with the Code of Fair Competition applicable to its industry, Kawneer and the Bronze Company, in their respective plants at Niles, Michigan, and Chicago, Illinois, shortened the total weekly hours of employment, increased the hourly rates of pay of their employees to the required minimum, and made equitable adjustments with those employees earning more than the minimum rate of pay so that under the shortened workweek such employees received approximately the same weekly wages as formerly received, all as required by the provisions of the President's Reemployment Agreement and Applicable Code; and, as a result of such compliance, Kawneer and the Bronze Company incurred increased costs in the manufacture and production of materials called for and used in connection with the above enumerated subcontracts.

15. Between May 1930 and February 28, 1934, it had been customary in the operation of the respective plants, where either had facilities to better perform certain types of work, for one of them to undertake the performance of portions of work called for under contracts held by the other. After February 28, 1934, Kawneer performed all the remaining incomplete portions of the Bronze Company contracts involved herein at which time it operated the plants at both Niles, Michigan, and Chicago, Illinois.

16. As appears from the summary of an audit made by the defendant, Kawneer and the Coleman Bronze Company between July 31, 1933, and February 28, 1934, and Kawneer

between February 28, 1934, and the date when it completed both its own and the Bronze Company's contracts, incurred increased costs over and above those they would have incurred had they not operated pursuant to the National Industrial Recovery Act and Agreements and Codes thereunder, for direct and indirect labor used in the execution of said contracts as follows:

Job	Direct labor		Indirect labor	
	Kawneer	Coleman	Kawneer	Coleman
Lansing—Kawneer Contract	$82.74	$485.45	$13.97	$53.27
St. Paul—Kawneer & Coleman Contracts	3,550.86	1,846.21	377.67	253.47
Norfolk—Coleman Contract	3,635.79	917.01	530.25	173.06
Washington—Coleman Contract	2,631.95	4,757.21	483.81	669.08
Rochester—Coleman Contract	113.67	317.32	9.25	44.56
Cincinnati—Coleman Contract		364.33		21.99
Columbus—Coleman Contract	787.58	990.93	132.23	235.54
Sioux City—Coleman Contract		1,075.13		99.99
	10,802.59	10,753.59	1,547.18	1,550.96

Total direct and indirect labor increases incurred by The Kawneer Company, August 1, 1933, to completion of contracts	$12,349.77
Total direct and indirect labor increases incurred by Coleman Bronze Company, August 1, 1933, to February 28, 1934	12,304.55
Total, both companies	$24,654.32

17. December 12, 1934, Kawneer filed claims under the Act of June 16, 1934 (41 U. S. C. A. 28–33), styled "The Kawneer Company (Successors to the Coleman Bronze Company)" with the Treasury Department of the United States, the department concerned with erection of Federal Buildings above enumerated, claiming reimbursement of increased costs allegedly due to the enactment of the National Industrial Recovery Act with respect to its and all the Bronze Company's subcontracts for furnishing materials used in construction of the aforesaid Federal buildings, that is, with the exception of the claim for reimbursement of alleged increased costs with respect to the Columbus, Ohio, post office building. Final settlement of the contract with Henry Ericsson Company for construction of the Columbus, Ohio, post office was made June 8, 1935, and on January 10, 1936, Kawneer filed a claim styled "The Kawneer Company (Suc-

cessors to the Coleman Bronze Company)" with the Treasury Department of the United States, the Department concerned with construction of this post office, claiming losses incurred by reason of enactment of the National Industrial Recovery Act.

18. The claims filed by Kawneer were considered by the Comptroller General under the Act of June 16, 1934 (41 U. S. C. A. Secs. 28–33). November 12, 1937, the Comptroller General directed to Kawneer eight separate settlement certificates, one for each claim submitted, all showing the same action and disallowing each of the claims; the one with regard to the Columbus, Ohio, post office was in part as follows:

> Your claim No. 057727 (6) for $3,401.51, filed under the act of June 16, 1934, 48 Stat. 974, representing increased costs alleged to have been incurred by reason of compliance with the National Industrial Recovery Act in the performance, as subcontractor, under contract No. Tlsa–4159, entered into by the United States with the Henry Ericsson Company, in furnishing and installing miscellaneous and ornamental metal work at the Columbus, Ohio, Post Office, Courthouse, etc., has been carefully examined and it is found that no part thereof may be allowed for the reasons hereinafter stated.
>
> The act of June 16, 1934, *supra*, authorized relief to those contractors or their subcontractors who entered into contracts with the United States prior to August 10, 1933, and incurred increased costs in the performance thereof by reason of compliance on and after August 10, 1933, with the applicable code or codes of fair competition approved by the President under section 3 of the National Industrial Recovery Act, 48 Stat. 196, or an agreement with the President under section 4 (a) of said act. By its express terms, the act makes compliance a condition precedent to the allowance of any benefits thereunder. In the absence of compliance relief may not be granted. Full compliance must be established as a fact—partial compliance will not suffice—and failure to establish full compliance means failure to establish a right to relief. * * *
>
> Although you were required on and after August 10, 1933, until the completion of your contract, to comply with each and every provision of the aforementioned agreement, the approved substituted provisions therefor, and the applicable approved code, the record indi-

cates and you admit that during the period from August 10, 1933, to March 8, 1934, two of your employees classified as messengers, were paid only 25 cents per hour, or $10 per week based on the maximum 40-hour week, although until the effective date of the code as prescribed by the President's Reemployment Agreement, the minimum wage for these employees was 37½ cents per hour, or $15 per week. On and after the effective date of the code, in accordance with the provisions thereof, you were required to pay one of the messengers, 18 years old, a minimum wage of 30 cents per hour, or $12 per week, while with reference to the other, 19 years old, the minimum wage rate remained 37½ cents per hour, or $15 per week.

Since, as hereinabove indicated, you not only failed to comply with the President's Reemployment Agreement, but also failed to comply with the applicable approved code, you are not entitled to any benefits under the act of June 16, 1934.

I therefore certify that no balance is found due you from the United States.

No payment has been made upon any of the claims.

19. The increased labor costs totaling $24,654.32, as set forth in finding 16, were incurred as a result of the enactment of the National Industrial Recovery Act by the Coleman Bronze Company, a wholly-owned subsidiary of the Kawneer Company, July 31, 1933, to February 28, 1934, and by the Kawneer Company individually July 31, 1933, to completion of the contracts, and as the successor by operation of law of the Coleman Bronze Company between February 28, 1934, and the completion of the contracts.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The facts are stipulated and show, as set forth in findings 16 and 19, that the increased direct and indirect labor costs incurred between July 31, 1933, and the completion of the contracts, under the subcontracts made by the Kawneer Company and the contracts made by the Coleman Bronze Company, and performed by Kawneer after February 28, 1934, were $12,349.77, and that the increased direct and indirect labor costs incurred between July 31, 1933, and February 28, 1934, under the subcontracts made by Kawneer's

wholly-owned subsidiary, the Coleman Bronze Company, were $12,304.55, or a total increase of direct and indirect labor costs of $24,654.32 incurred under all the subcontracts between July 31, 1933, and completion thereof as a result of enactment of the National Industrial Recovery Act.*

Counsel for defendant contend that the claims for increased costs filed by plaintiff, the Kawneer Company, for itself and the Coleman Bronze Company, under the act of June 16, 1934, styled "The Kawneer Company, successor to the Coleman Bronze Company," were not sufficient or valid claims under the 1934 act insofar as increased costs incurred before or after February 28, 1934, under the subcontracts made by the Coleman Bronze Company are concerned. These claims set forth in detail the itemized increased costs under each and all of the contracts of both companies for which reimbursement was claimed by the Kawneer Company, individually, and as successor of the subsidiary, the Coleman Bronze Company, under the 1934 act for direct and indirect labor costs of the Kawneer Company and the Coleman Bronze Company under the subcontracts of both companies. Counsel for defendant take the position, first, that no valid claim was filed by or on behalf of the Coleman Bronze Company under the act of June 16, 1934, for any of the increased labor costs incurred under contracts made by it, and that recovery, in this case, for the increased costs incurred under the subcontracts made by the Coleman Bronze Company must be limited to $253.89, representing increased costs so incurred prior to August 10, 1933, as to which period no claim was necessary to be filed under the act of June 16, 1934, in order to give this court jurisdiction under the act of 1938; second, that the claims for increased costs prepared and filed by the Kawneer Company, as set forth in the findings, individually and as the successor of the Coleman Bronze Company, were valid under the act of June 16, 1934, only as to the increased costs incurred by the Kawneer Company as a result of the enactment of the National Industrial Recovery Act under the subcontracts made by the

*U. S. Code, Title 15, section 701.

Kawneer Company; and third, that the claim made by the Kawneer Company on the subcontracts entered into separately by it and the Coleman Bronze Company with reference to the Columbus, Ohio, post office was made too late under the act of June 16, 1934, and this court is without jurisdiction under the 1938 act to make any allowance on account of the increased costs incurred by either company under the Columbus, Ohio, subcontracts. It is therefore contended that recovery must be limited to $11,429.96 in favor of the Kawneer Company, representing the increased costs incurred by that company as a result of the enactment of the National Industrial Recovery Act under the subcontracts made by the Kawneer Company in connection with the Federal buildings, except its Columbus, Ohio, contract.

We are of opinion upon the facts and under the provisions of the acts of June 16, 1934, and June 25, 1938,* with reference to the presentation of claims for increased costs, that the claims as filed by Kawneer Company under the act of 1934, individually and as successor of the Coleman Bronze Company, for the increased costs incurred under the subcontracts made by the two companies were valid and sufficient to give this court jurisdiction to hear and determine the claims under the provisions of the act of June 25, 1938.

The argument made by defendant in this case, that no valid claim was made under the 1934 act by or on behalf of the Coleman Bronze Company for increased costs incurred under the subcontracts made by that company, is a technical defense which does not, we think, find sufficient support in the facts and circumstances to sustain it. Detailed itemized claims for increased costs under the contracts made by the Kawneer Company and the Coleman Bronze Company were in fact made and filed, and these claims were considered, acted upon, and decided by the Comptroller General without objection to their presentation by and through the Kawneer Company, or to the form in which they were styled, namely, "The Kawneer Company, successor to the Coleman Bronze Company." As shown by the facts, and as disclosed in the claims as made,

*U. S. Code, Title 41, sections 28–33.

the Kawneer Company was the successor on and after February 28, 1934, of the Coleman Bronze Company which, up to that time, had been a wholly-owned subsidiary of the Kawneer Company. Prior to February 28, 1934, the Bronze Company had made certain subcontracts and had partly performed them. Through a merger and consolidation Kawneer acquired all the property and assets of Coleman Bronze Company and assumed all its liabilities on February 28, 1934, in exchange for the Coleman Bronze Company's stock. The Kawneer Company completed the contracts originally made by its subsidiary, the Coleman Bronze Company. By this merger and consolidation the right of the Kawneer Company as the successor of Coleman Bronze Company to present a claim under the act of June 16, 1934, for increased costs incurred as a result of enactment of the National Industrial Recovery Act, under the contracts of Coleman Bronze Company prior and subsequent to February 28, 1934, was not barred under the nonassignment of the claims provisions of section 3477 of the Revised Statutes under the rule announced and applied in *Seaboard Air Line Railway* v. *United States*, 256 U. S. 655, and *Kingan & Company* v. *United States*, 71 C. Cls. 19. It is true that at the time of the merger and consolidation on February 28, 1934, neither company, except through a petition to Congress, was entitled as of right to relief or reimbursement for increased costs, but, when the act of June 16, 1934, was approved, the rights granted thereby with reference to increased costs under contracts made by the Bronze Company vested in or inured to the benefit of the Kawneer Company. Technically, the Bronze Company might have joined in the claims made under the 1934 act for the use and benefit of the Kawneer Company, inasmuch as the Bronze Company had not been formally dissolved, but this was not necessary for it had no actual or beneficial interest in the claim. The Kawneer Company was the actual as well as the beneficial owner of the claim which passed to it in the merger and consolidation. The 1934 act gave completing sureties the right to make claims and receive payments thereon, and it would seem that the act did not intend to deny such right to successors through merger and consolidation. *Sea-*

board Air Line Railway v. *United States*, *supra*, and *Kingan & Company* v. *United States*, *supra*.

In addition we think, in view of the Congressional history of the acts of June 16, 1934, and June 25, 1938, that Congress intended that the *proviso* of section 1 of the 1938 act should receive a liberal rather than a technical construction so as to accomplish the equitable purposes intended by that act as well as of the prior act of 1934. The 1938 act enlarged the period during which increased costs incurred could be recovered and for this enlarged period recovery of increased costs can be had even if no claim for any period was presented under the 1934 act. The purpose of limiting suits for increased costs incurred between August 10, 1933, and completion of contracts to those cases where claims had been filed was to prevent the presentation in this court of a new set of claims, stale claims, or claims which the interested party did not consider to be good enough, or meritorious enough, to be presented under the 1934 act. That purpose is consistent with and is maintained by our conclusion that the claims presented by the Kawneer Company, now under consideration, were sufficient under the 1934 and 1938 acts.

We therefore hold that under the provisions of sections 3 and 4 of the act of June 16, 1934, proper and sufficient claims were presented to give this court jurisdiction of the claim made herein under the provisions of section 1 of the act of June 25, 1938, and that the Kawneer Company is therefore entitled to recover the stipulated increased direct and indirect labor costs of $24,654.32 incurred as a result of the National Industrial Recovery Act in the performance of the subcontracts made by it and the Coleman Bronze Company.

The next question is whether recovery can be had for the excess costs incurred as a result of enactment of the National Industrial Recovery Act under the subcontracts of the Kawneer Company and the Coleman Bronze Company in the amount of $2,146.28 under the subcontracts made and performed in connection with the Columbus, Ohio, post office. The increased costs so incurred were $919.81 under the subcontracts made by the Kawneer Company and $1,226.47 under the subcontracts originally made by the Cole-

man Bronze Company, and subsequently under the merger and consolidation of February 28, 1934, taken over and completed by the Kawneer Company, as set forth in the findings, as were other subcontracts of the Bronze Company involved in the first issue hereinbefore discussed. This claim for the increased costs incurred under the subcontracts of the Kawneer Company and the Bronze Company was made and filed under these subcontracts by the Kawneer Company under the style "The Kawneer Company, successor to Coleman Bronze Company," on January 10, 1936, which was more than six months after completion of the prime contract on June 8, 1935.

The defendant argues here that recovery of the excess costs incurred under these subcontracts, either by the Kawneer Company or the Coleman Bronze Company, must be denied for lack of jurisdiction under the act of 1938 because the claim was not filed within six months after completion of the prime contract on June 8, 1935. The 1938 Act does not limit our jurisdiction to claims filed under the 1934 act within six months, but to claims "presented within the limitation period defined in section 4 of the act of June 16, 1934." The period so defined was six months or more, in the discretion of the Comptroller General. So far as appears the Comptroller General considered that the circumstances under which the claim was presented were sufficient to justify him in considering and deciding it although it was presented late, and, having full discretion to do this and having so considered and decided the claim, it cannot now be said that if he had found it to be allowable he would have refused to allow it because presented late. We must hold that he exercised his discretion, for upon this depended his jurisdiction and authority to consider and decide on the merits of the claim. This claim, as were others, was presented under the subcontracts made by the Kawneer Company and the Bronze Company, and the claim was considered and reported on to the Comptroller General by the administrative establishment concerned without objection to its presentation by Kawneer. The Comptroller General considered the claim on the merits and denied it by a separate certificate on the ground that "after careful consideration" no part of the amount claimed could

be allowed for the reason that there had been a departure from strict compliance with the President's Reemployment Agreement. The Comptroller General stated with reference to this Columbus post-office claim that "By its express terms, the act [of June 16, 1934] makes compliance a condition precedent to the allowance of any benefits thereunder. In the absence of compliance, relief may not be granted. Full compliance must be established as a fact—partial compliance will not suffice—and failure to establish full compliance means failure to establish a right to relief." See finding 18. Under the express terms of section 4 of the act of June 16, 1934, the Comptroller General was given absolute discretion where he considers there was good cause for late presentation to consider and decide a claim filed late—the exact language of section 4 being that "No claim hereunder shall be considered or allowed unless presented within * * * six months after the completion of the contract, except in the discretion of the Comptroller General for good cause shown by the claimant." What constituted good cause was solely for the Comptroller General to decide. Under the terms of the 1934 act it was not mandatory that he make an order extending the time for filing where a claim had been presented late, nor was it necessary, in order for this court to acquire jurisdiction under the act of 1938, for the claimant to make formal application to the Comptroller General under the act of 1934 for extension of time. Although the Comptroller General, in his discretion, might have required an application to be made for an extension of time for filing he did not do so and, in so considering and acting upon the claim on its merits, he exercised the discretion conferred upon him by the act. By the express terms of the act of 1934 the Comptroller General had the right, in his discretion, to receive, consider, and act upon a claim filed late. That act, under which this Columbus, Ohio, claim was made, provided that claims presented thereunder should be considered and decided upon a fair and equitable basis. By receiving, considering, and deciding upon the Columbus, Ohio, post-office claim, which showed on its face that it was filed more than six months after the prime contract had been

completed, the Comptroller General, in effect, extended the time for presentation of the claim and, in any event, having authority to so extend the time, by considering and deciding it, he waived any objection, which may here be urged, to the late filing thereof. See *Thompson* v. *United States*, 91 C. Cls. 166; *Callahan Construction Company* v. *United States*, 91 C. Cls. 538. Since he did not object to the late presentation we cannot do so now.

In addition to what has been said it should be pointed out that section 3 of the 1938 act provides that "Judgments or decrees, if any, under this Act, shall be allowed upon a fair and equitable basis, and notwithstanding the bars or defenses of any alleged * * * laches, or any provisions of Public Act * * * June 16, 1934." Laches is defined as neglect to do a thing at the proper time. That is, in effect at least, the defense interposed here. We think the quoted language of Section 3 of the 1938 Act means that if the Comptroller General did not hold, under Section 4 of the 1934 Act, that the claim could not "be considered or allowed" because presented late without good cause, the defense of late presentation cannot be made here. Section 3 of the 1938 Act is interpretative of other provisions of that act including the jurisdictional provisions of Section 1 thereof. Whatever may be the full extent of the meaning of the provision of Section 3 of the 1938 Act excluding the defense of laches, we think it at least means that a defense based on late presentation cannot be made here under the 1938 Act where the Comptroller General had made no such objection under the 1934 Act. In these circumstances the court has jurisdiction to consider and decide the claim made herein as to the increased costs incurred by the Kawneer Company and the Coleman Bronze Company under the subcontracts in connection with the Columbus, Ohio, post office.

Judgment will be entered in favor of plaintiff, the Kawneer Company, for $24,654.32. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

THE JOHN WEENINK AND SONS COMPANY v. THE UNITED STATES

[No. 44406. Decided October 4, 1943]

On the Proofs

Increased labor costs under National Industrial Recovery Act; recovery under the Act of June 25, 1938 only for direct results of enactment.—In order to recover under the Act of June 25, 1938, it must be shown that the loss sustained by contractor was the direct result of the enactment of the National Industrial Recovery Administration Act. See *McCloskey & Company* v. *United States*, 98 C. Cls. 90, and *Dravo Corporation* v. *United States*, 93 C. Cls. 734.

Same.—In the instant case the immediate cause of the plaintiff's extra labor costs was the inefficiency of its employees, under the "stagger system" of employment adopted on the recommendation of a Joint Labor Committee, representing roofing contractors and a local union of roofers, with the purpose of spreading employment in conformity with the purposes of the National Industrial Recovery Administration Act but not a direct result of the enactment thereof.

The Reporter's statement of the case:

Mr. Horace S. Whitman for the plaintiff.

Mr. Gaines V. Palmes, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff is a corporation organized and existing under the laws of the State of Ohio, with its principal place of business at Cleveland, Ohio.

2. The petition herein is filed by the plaintiff as a subcontractor, pursuant to the Act of Congress approved June 25, 1938, entitled "An Act To confer jurisdiction on the Court of Claims to hear, determine, and enter judgment upon the claims of Government contractors whose costs of performance were increased as a result of enactment of the National Industrial Recovery Act, June 16, 1933." 52 Stat. 1197.*

*U. S. Code, Title 15, section 701; Title 41. section 28.

3. On January 30, 1933, the plaintiff entered into a subcontract with a Government contractor whereby plaintiff agreed to furnish all labor, material, tools and equipment for and install in place complete all roofing, insulation and waterproofing required by the prime contract for the construction of a post office building at Cleveland, Ohio.

4. The plaintiff signed the President's Reemployment Agreement August 29, 1933, commenced work on its subcontract October 23, 1933, and completed it July 18, 1934.

5. About August 1, 1933, the plaintiff joined the Composition Roofers' Association, whose members were all roofing contractors of Cleveland. There existed at the time in Cleveland a local Composition Roofers' Union. In August 1933, there was formed a Joint Labor Committee consisting of three members of the Association and three members of the Union to discuss and agree on wages and working conditions. At the last named date, and for sometime prior thereto, about 50 percent of the members of the Union were out of employment.

6. It was the understanding of the Joint Labor Committee that a purpose of the National Industrial Recovery Act was to spread work in order to give more employment to members of the Union. The union members of the Joint Labor Committee requested a stagger system of employment which would give some work to all members of the Union. The Union had a list of all its members. Under this system if a member of the Association required labor it would call upon the Union and the Union would furnish members from the top of the list, who, after working from 3 to 6 days, would be placed at the bottom of the list. When a member of the Association then called for labor the members of the Union at the top of the list would be sent. The Association, including the plaintiff, in order to carry out "a purpose of the National Industrial Recovery Act" herein referred to, approved the stagger system which went into effect about the time plaintiff started work on its subcontract.

7. The nature of plaintiff's work was such that it required 5 or 6 men in a crew. The make-up of a crew required a

kettleman, one man who could roll felt, and one man who could mop, and the other men in the crew were used for carrying and getting material around. The first three men named, making up the crew, required special skills. Depending on the amount of work to be done, plaintiff had on this job at different times from 5 to 15 union workers. Under the stagger system some of the men assigned to plaintiff did not have the special skills required to do the work efficiently.

8. Before the stagger system went into effect plaintiff had in its employ crews with the special skills required. Plaintiff was permitted to retain its foreman throughout the performance of the subcontract. During most of the work on the subcontract, the Union complied with plaintiff's request to keep on the job 3 or 4 other men in its regular employ. Throughout the performance of the subcontract about 35 other members of the Union were assigned to the job who theretofore had not been employees of plaintiff. From these laborers the plaintiff did not have the cooperation and loyalty it formerly had from its regular employees.

9. The stagger system, so adopted and put into operation, delayed plaintiff in the performance of its subcontract and increased plaintiff's labor costs. The additional labor costs so incurred by plaintiff amounted to at least $1,112.90, the amount claimed in the petition. Both before and after the approval of the National Industrial Recovery Act plaintiff paid the union scale of wages. During the performance of the subcontract the union scale of wages was not increased as a result of the National Industrial Recovery Act.

10. On January 21, 1935, more than six months after completion of its subcontract, the plaintiff filed with the Treasury Department, in pursuance of the Act of June 16, 1934 (41 U. S. C., secs. 28–33), a verified claim in the amount of $1,830.11 for increased costs allegedly incurred subsequent to August 10, 1933, as a result of alleged compliance with the President's Reemployment Agreement signed by the plaintiff August 29, 1933, in performance of the subcontract involved in this suit.

11. The evidence fails to establish that increased costs incurred by plaintiff in performing the contract were the result of the National Industrial Recovery Act.

The court decided that the plaintiff was not entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

The plaintiff is the subcontractor of a Government contractor and agreed to furnish all labor, material, tools and equipment for and install in place all roofing, insulation and waterproofing required by the prime contract for the construction of a post office building to be erected in Cleveland, Ohio. Plaintiff's petition was filed pursuant to the Act of Congress approved June 25, 1938, entitled "An Act to confer jurisdiction on the Court of Claims to hear, determine, and enter judgment upon the claims of Government contractors whose costs of performance were increased as a result of enactment of the National Industrial Recovery Act, June 16, 1933." 52 Stat. 1197.

On August 1, 1933, plaintiff joined the Composition Roofers' Association, whose members were all roofing contractors. There existed at the time in the city a local Composition Roofers' Union. At this time there was formed a Joint Labor Committee consisting of three members of the Association and three members of the Union to discuss and agree on wages and working conditions. For sometime prior thereto and at that time about one-half of the members of the Union were out of employment. The Joint Labor Committee construed the National Industrial Recovery Act to mean that work was to be spread in such a way as to give employment to more members of the Union.

With this idea in view the Union members of the Joint Labor Committee requested that a stagger system of employment, which would give some work to all members of the Union, be inaugurated. By this system the members of the Association requiring labor would call upon the Union and the Union would furnish members from the top of the list, who, after working from three to six days would be placed at the bottom of the list. The Association approved this

stagger system on the theory that it carried out the purposes of the National Industrial Recovery Act and it was put into effect about the time plaintiff started work on its subcontract. Only Union men were employed and Union wages paid.

The plaintiff did not sign the President's Reemployment Agreement until August 29, 1933, and commenced work on its subcontract on October 23, 1933, completing it July 18, 1934.

The facts in the case show that whatever delay was suffered by plaintiff and whatever losses were incurred arose in the stagger system, which had been adopted by the plaintiff at the insistence of the Union, and not as a result of the National Industrial Recovery Act.

We have repeatedly held that in order to recover a plaintiff has to show that the loss sustained was the direct result of the Act.

In this case from a recitation of the facts it is evident that the stagger system was the real cause of the work being spread over a longer period and the loss was occasioned by the inefficiency of men performing the particular work, as many of the men assigned to plaintiff were not skilled in the special work they had to perform. See *McCloskey & Company* v. *The United States*, (No. 44003) 98 C. Cls. 90, and *Dravo Corporation* v. *United States*, 93 C. Cls. 734..

The reduction and relief of unemployment was, of course, a purpose of the National Industrial Recovery Act, and it may be that the stagger system as used on this job helped, in a way, toward that end. But the jurisdictional Act, giving the right to sue herein, contemplates relief from a situation brought about as a result of the Recovery Act.

We have no proof of any inherent defect in a stagger system, as such. The real, immediate cause of plaintiff's extra expenses was the inefficiency of its employees. There is no evidence that the Government forced, induced, or urged the employment of men not adapted to their work. For aught that is demonstrated to the contrary, a stagger system might be well managed, as here it was not.

High as the motives were that were back of its adoption, the weakness of the stagger system as it was here applied cannot be charged to the National Industrial Recovery Act.

Syllabus

Inefficiency is not shown to have been the inevitable result of the stagger system, nor can it in any wise be attributed to the fact that the National Industrial Recovery Act was placed upon the statute books.

Plaintiff's petition is dismissed. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge,* concur.

JONES, *Judge,* took no part in the decision of this case.

JOHN E. SJÖSTRÖM COMPANY, INC., A CORPORATION, v. THE UNITED STATES

[No. 44383. Decided October 4, 1943]

On the Proofs

Increased costs under the National Industrial Recovery Administration Act; evidence not sufficient to show increased costs of lumber were result of enactment.—It is *held* that the evidence submitted by plaintiff is not sufficient to establish that the increased costs for lumber used in the manufacture of articles covered by plaintiff's contracts with defendant were the result of the enactment of the National Industrial Recovery Administration Act, and accordingly plaintiff is not entitled to recover therefor. See *Steel Products Engineering Company* v. *United States*, 90 C. Cls. 513, 518.

Same; increases made to maintain wage differentials among employees.—Where, in order to maintain wage-rate differentials among its employees, as required by Section 4 (a) of the National Industrial Recovery Administration Act and Paragraphs 6, 7, and 8 of the President's Reemployment Agreement, plaintiff made increases in the wages of its employees receiving more than 40 cents per hour; it is *held* that such increases were justified under the statute and agreement and plaintiff is accordingly entitled to recover.

Same; increased labor costs which were direct result of enactment.—Upon the proof showing that plaintiff made wage increases to meet the minimum wage provisions of the President's Reemployment Agreement; it is *held* that such increases were the direct result of the enactment of the National Industrial Recovery Administration Act and plaintiff is entitled to recover.

The Reporter's statement of the case:

Mr. Fred B. Rhodes for plaintiff. *Rhodes, Klepinger & Rhodes* were on the brief.

Mr. Currell Vance, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

In the petition filed herein, plaintiff claims $10,401.90, increased labor and material costs incurred as a result of the enactment of the National Industrial Recovery Act in performance of two contracts with the defendant.

On the proof it seeks to recover alleged increased cost of lumber in the amount of $1,891.18 and increased direct and indirect labor costs, including overhead, in the amount of $5,574.91, or a total of $7,466.09.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff, a Pennsylvania corporation with principal office and place of business at Philadelphia, brought this suit under an act of Congress approved June 25, 1938, 52 Stat. 1197, 41 U. S. Code, 28, note, conferring upon this court, jurisdiction to hear, determine, and enter judgment upon the claims of Government contractors whose costs of performance were increased as a result of enactment of the National Industrial Recovery Act, June 16, 1933, to recover additional increased costs for material, labor, and overhead incurred after August 10, 1933, alleged to have been the result of the enactment of the National Industrial Recovery Act. (U. S. Code, Title 15, section 701.)

2. May 17, 1933, plaintiff entered into a contract, No. 56710, with defendant through the Procurement Division, Treasury Department, to furnish certain special furniture for Federal buildings, and on June 22, 1933, it entered into a contract numbered 11753 with defendant through the Post Office Department to furnish certain routing cases and tables. The articles called for by these contracts were to be manufactured by plaintiff. These contracts are in evidence as plaintiff's exhibits 2 and 1, respectively, and are made a part hereof by reference.

3. Plaintiff signed the President's Reemployment Agreement August 1, 1933, which agreement is in evidence as plaintiff's exhibit 4 and is made a part hereof by reference. Thereafter plaintiff became subject to a Code of Fair Competition which covered a part of the products which plaintiff was engaged in manufacturing, but the Code was not applicable to the articles manufactured by plaintiff in its performance of the two contracts with the government, hereinabove referred to. These contracts set forth the articles to be manufactured and delivered by plaintiff and the unit prices of the articles to be furnished. The contract with the Treasury Department specified the various items to be furnished, and the prices thereof, the articles to be delivered within 75 days from date of order. The contract with the Post Office Department was one for supplies of the kinds mentioned therein during the fiscal year beginning July 1, 1933, and 1934, to be delivered within 75 days from date on which ordered. As the defendant was in need of the articles specified in the contracts, it issued purchase orders to plaintiff for such of the articles as and when desired, and upon receipt of such purchase orders plaintiff proceeded to manufacture the articles as specified in the contracts and as designated in the purchase orders. Both contracts were fully performed by plaintiff in accordance with their terms and conditions, and the contract prices specified therein have been paid to plaintiff in full.

MATERIAL COSTS

4. The increased costs claimed by plaintiff for material used in the manufacture of the articles for defendant, as covered by both contracts, are limited to lumber which plaintiff needed and purchased to manufacture the contract articles from time to time as ordered. Throughout performance of these contracts plaintiff did not keep on hand a large supply of lumber. When these contracts were entered into and during the time they were performed plaintiff was operating largely on borrowed capital, and, for this reason, it had on hand only a limited supply of lumber. Due to this fact, the lumber entering into the manufacture of the articles, when and as ordered by defendant, was chiefly purchased

after plaintiff received purchase orders from the Treasury Department or the Post Office Department. The period for delivery after order appears to have been fixed with that fact in view. Due to the fact that the lumber necessary for manufacture of the articles called for was to be dried in a special kiln, plaintiff did not use the lumber ordered immediately after its purchase and receipt. Plaintiff did not have an inventory of the lumber on hand on the dates when contracts were entered into, and it did not maintain a perpetual inventory showing particular lumber on hand and used in specific articles during performance of contracts. However, the separate invoices and other records of plaintiff of the lumber purchased and used showed the amount on hand at about the dates of the contracts which was subsequently used thereon, the amount subsequently purchased, and the prices thereof, that was used in the manufacture of articles ordered under the contracts.

5. The lumber purchased by plaintiff for use on these contracts increased in price from the dates the contracts were entered into, and during the time of performance of the contracts after plaintiff signed the President's Reemployment Agreement on August 1, 1933.

In computing the increased costs of lumber on and after August 10, 1933, the beginning of the period of plaintiff's claim for increased costs, plaintiff took the invoice prices of different kinds of lumber used by it, as shown on the invoices, on or about the dates the contracts were entered into and the invoice prices of the same kind of lumber purchased and received shortly before such lumber was used on or after August 10, 1933, in the production of articles to fill the purchase orders of defendant. As to lumber which plaintiff determined was on hand on or about the dates of the contract that was used in production of the articles ordered by defendant, no increased costs are claimed.

6. The increased costs of lumber purchased by plaintiff which entered into the production on and after August 9, 1933, of articles ordered by defendant on the two contracts hereinbefore mentioned, computed in the manner stated in the preceding finding, are $1,090.66 on Treasury Department

contract #56710 and $800.52 on the Post Office Department contract #11753, or a total of $1,891.18.

The evidence is not sufficient to establish that these increased costs of material were the result of the enactment of the National Industrial Recovery Act.

INCREASED LABOR COSTS

7. Section 4 (a) of the National Industrial Recovery Act provided that—"The President is authorized to enter into agreements with, and to approve voluntary agreements between and among, persons engaged in a trade or industry, labor organizations, and trade or industrial organizations, associations, or groups, relating to any trade or industry, if in his judgment such agreements will aid in effectuating the policy of this title with respect to transactions in or affecting interstate or foreign commerce, and will be consistent with the requirements of Clause (2) of sub-section (a) of Section 3 for a code of fair competition."

The President's Reemployment Agreement provided so far as material here as follows:

> During the period of the President's emergency reemployment drive, that is to say, from August 1 to December 31, 1933, or to any earlier date of approval of a code of fair competition to which he is subject, the undersigned hereby agrees with the President as follows:
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> * * * * *
>
> (3) Not to employ any factory or mechanical worker or artisan more than a maximum week of 35 hours until December 31, 1933, *but with the right to work a maximum week of 40 hours for any 6 weeks within this period;* and not to employ any worker more than 8 hours in any one day. [By Executive Order the italicized words were omitted in any agreement signed on or after October 1, 1933].
>
> * * * * *
>
> (6) Not to pay any employee of the classes mentioned in paragraph (3) less than 40 cents per hour unless the hourly rate for the same class of work on July 15, 1929, was less than 40 cents per hour, in which latter case not to pay less than the hourly rate on July 15, 1929, and in no event less than 30 cents per hour. It is agreed

that this paragraph established a guaranteed minimum rate of pay regardless of whether the employee is compensated on the basis of a time rate or on a piece-work performance.

(7) Not to reduce the compensation for employment now in excess of the minimum wages hereby agreed to (notwithstanding that the hours worked in such employment may be hereby reduced) and to increase the pay for such employment by an equitable readjustment of all pay schedules.

(8) Not to use any subterfuge to frustrate the spirit and intent of this agreement which is, among other things, to increase employment by a universal covenant, and to remove obstructions to commerce, and to shorten hours and to raise wages for the shorter week to a living basis.

July 28, 1933, the National Recovery Administration made an official announcement interpreting the President's Reemployment Agreement in which it stated with reference to wage differentials that "The policy governing the readjustment of wages of all employees in what may be termed the higher wage groups requires not a fixed rule but an 'equitable readjustment' in view of long standing differentials in pay schedules * * *."

8. Beginning on August 9, 1933, and covering a period of two or three weeks plaintiff, in order to comply with the President's Reemployment Agreement, made certain adjustments in working hours per week and increased hourly wages for its employees, which, for convenience, are classified as follows:

First Adjustment.—In this adjustment plaintiff reduced the workweek from 43¾ to 40 hours and increased the wages of its employees to the minimum wage required by the reemployment agreement, plus additional increases in wages of other employees so that no employee would receive less money per week for the 40-hour workweek than he had received for the 43¾-hour workweek.

Second Adjustment.—After the foregoing adjustment of hours and wages had been made, plaintiff made certain other increases in wages of certain employees so that there would be maintained the same wage-rate differential among the employees. That is, plaintiff, under paragraphs 7 and 8 of

the P. R. A., made certain other increases in wages of certain employees receiving more than the 40 cents per hour minimum wage rate specified in paragraph 6 of the P. R. A. so that there would be maintained the same wage rate differential among the employees as existed prior to the signing of the P. R. A. on August 1, 1933; that is to say, some of the employees received increases so that there would be the same spread in pay among all employees as there was on August 1, 1933.

9. The increased labor costs resulting from the first increase in wages to the forty-cents minimum specified were as follows:

Direct labor, Contract No. 56710	$1,362.92
Direct labor, Contract No. 11753	537.03
Indirect labor, Contract No. 56710	287.23
Indirect labor, Contract No. 11753	106.64
Nonproductive of direct labor, Contract No. 56710	42.31
Nonproductive of direct labor, Contract No. 11753	14.74
Total	2,350.87

The term "nonproductive of direct labor" used herein is defined as work by direct laborers which could not under the cost system of accounting be allocated to any particular job of manufacturing a particular article.

10. The increased labor costs resulting from the second adjustment mentioned above which was put into effect soon after August 9, 1933, were as follows:

Direct labor, Contract No. 56710	$1,099.53
Direct labor, Contract No. 11753	395.89
Indirect labor, Contract No. 56710	55.64
Indirect labor, Contract No. 11753	20.65
Nonproductive of direct labor, Contract No. 56710	29.90
Nonproductive of direct labor, Contract No. 11753	10.41
Total	$1,612.02

11. The increased labor costs incurred and paid by plaintiff in order to comply with what it believed to be the requirements of the President's Reemployment Agreement and the interpretations thereof by officials of the National Recovery Administration resulting from both the first and second adjustments above mentioned were as follows:

Direct labor, Contract No. 56710	$2,462.45
Direct labor, Contract No. 11753	932.92
Indirect labor, Contract No. 56710	342.87
Indirect labor, Contract No. 11753	127.29
Nonproductive of direct labor, Contract No. 56710	72.21
Nonproductive of direct labor, Contract No. 11753	25.15
Total	$3,962.89

12. The increased labor costs of $3,962.89, incurred and paid by plaintiff on and after August 9, 1933, in performance of the two contracts hereinbefore mentioned, with defendant, were the result of enactment of the National Industrial Recovery Act.

13. The claim herein sued on, which arose under the two contracts hereinbefore mentioned, was filed in separate claims within the time specified by the act of June 16, 1934.* and they were considered and denied by the Comptroller General. Both claims were originally transmitted by plaintiff to the Post Office Department, but no objection was raised by anyone to the claim made under the Treasury Department contract by reason of its having been mailed to the Post Office Department, along with the claim under the Post Office Department contract. Plaintiff had been carrying on correspondence with the Post Office Department since early in October 1933 with reference to its claim for reimbursement of its excess costs due to the enactment of the National Industrial Recovery Act.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The claim made by plaintiff in this case is for alleged increased cost of material and labor as a result of the enactment of the National Industrial Recovery Act and the President's Reemployment Agreement issued thereunder in connection with the performance after enactment of the National Industrial Recovery Act of two contracts with defendant entered into in May and June, 1933, as described in the findings.

*U. S. Code, Title 41, sections 28–33.

Defendant contends that plaintiff is not entitled to recover any amount for the reasons—first, that the evidence is not sufficient to establish with certainty the exact increased costs incurred for material and labor used in performance of the contracts after the signing by plaintiff of the President's Reemployment Agreement August 9, 1933; second, that if the court finds that the increased cost of lumber purchased and used in performance of the contracts after August 9, 1933, can be determined, the proof submitted by plaintiff is not sufficient to show that such increased cost, which it is contended did not exceed $1,891.18, resulted from enactment of the National Industrial Recovery Act; third, that if the court can determine the increased costs incurred for direct and indirect labor after August 9, 1933, such increased labor cost as the result of wage increases made by plaintiff did not exceed $3,962.89, and that of this total of wage increases no amount in excess of $2,350.87, as set forth in findings 8 and 9, can be allowed as an increased cost resulting from enactment of the National Industrial Recovery Act and compliance with the President's Reemployment Agreement; and fourth, that the balance of $1,612.02 of the wage increases made on and soon after August 9, 1933, as set forth in findings 8 and 10, did not result from enactment of the National Industrial Recovery Act and compliance with the provision of the President's Reemployment Agreement for the reason that these wage increases were in excess of the minimum wage increases to 40 cents an hour contemplated by the Reemployment Agreement.

The proof satisfactorily establishes that plaintiff incurred and paid increased costs of $1,891.18 for lumber purchased and used in performance of the contracts on and after August 9, 1933, and that it incurred and paid increased costs of $3,962.89 for direct and indirect labor in performance of the contracts with defendant on and after August 9, 1933. However, the evidence submitted by plaintiff is not sufficient to establish that the increased cost of $1,891.18 for lumber used in the manufacture of articles covered by its contracts with defendant was the result of the enactment of the National Industrial Recovery Act. The only admissible evidence we have in the record as to the cause of this increased

material cost is the opinion of plaintiff's president, based on hearsay, that this increased cost paid to persons from whom it purchased lumber resulted from enactment of the National Industrial Recovery Act. He had no personal knowledge as to the cause of the increase. Direct evidence as to the cause of the increased prices charged by persons from whom plaintiff purchased lumber was available, and persons having knowledge of the cause and reason for the increased prices charged for lumber after June 16, 1933, were available and could have been called by plaintiff to testify and be subjected to cross-examination by defendant. These witnesses were not called. See *Steel Products Engineering Company v. United States*, 90 C. Cls. 513, 518.

We are of opinion that the increased labor costs incurred and paid in the amount of $3,962.89, as set forth in findings 7 to 13, inclusive, were the result of enactment of the National Industrial Recovery Act and are recoverable under the provisions of the jurisdictional act of June 25, 1938. Aside from the claimed inadequacy of the proof and records as to the exact amount of increased labor costs attributable to performance of the government contracts on and after August 9, 1933, defendant does not contend that plaintiff should not be allowed such increased labor costs through such wage increases as were necessary to bring the wage rates of its employees to the minimum requirements of the President's Reemployment Agreement of 40 cents an hour. But defendant does contend that no recovery can be had for wage increases made by plaintiff to maintain wage-rate differentials among its employees as set forth under the heading of "Second Adjustment" in finding 8, in the amount of $1,612.02, as set forth in finding 10, for the alleged reason that enactment of the National Industrial Recovery Act and the President's Reemployment Agreement, or either of them, did not cause or bring about this increased labor cost. In other words, it is contended that increases by plaintiff in the wages of employees receiving more than 40 cents an hour in order to maintain wage differentials after increasing wages to the minimum of 40 cents an hour and the shortening of the work-week were wage increases in excess of the increased wages contemplated by the President's Reemployment Agreement

and that no provision of the National Industrial Recovery Act or a Code of Fair Competition caused or brought about such increased costs.

The proof shows and we have found as a fact, as set forth in findings 8 and 9, that plaintiff made wage increases in the amount of $2,350.87 to meet the minimum wage provisions of the President's Reemployment Agreement. This increase in wages resulted from enactment of the National Industrial Recovery Act and plaintiff is entitled to recover that amount.

The proof further shows that plaintiff made further wage increases amounting to $1,612.02, referred to in findings 8 and 10 as the "Second Adjustment" for the purpose of and in an attempt to comply with and meet the requirements of section 4 (a) of the National Industrial Recovery Act and paragraphs 6, 7, and 8 of the President's Reemployment Agreement, and in this we are of opinion that plaintiff was justified. Under paragraph 7 of the Reemployment Agreement signed by plaintiff August 9, 1933, plaintiff agreed not to reduce compensation for employees then in excess of the minimum wages therein agreed to, notwithstanding that the hours of work in such employment might be reduced, and "to increase the pay for such employment by an equitable readjustment of all pay schedules." This paragraph of the Reemployment Agreement clearly had reference to existing wages in excess of the minimum of 40 cents an hour referred to in paragraph 6 and it meant, according to its clear language, that the equitable readjustment of all pay schedules referred to would produce "an increase [in] the pay for such employment." The term "such employment" referred to was clearly the "employment now in excess of minimum wages hereby agreed to." In addition to this language of paragraph 7, which plaintiff reasonably interpreted, the National Recovery Administration on July 28, 1933, publicly stated with reference to wage differentials that "The policy governing readjustment of wages of all employees in what may be termed the higher wage groups, requires, not a fixed rule, but an 'equitable readjustment' in view of the long-standing differentials in pay schedules." This was the policy pursued by plaintiff and it was for that

reason that the wage increases totaling $1,612.02 were made to maintain the wage rate differentials in its pay schedules.

Wage increases totaling $3,962.89 incurred and paid by plaintiff in the performance of the contracts with defendant were the result of the enactment of the National Industrial Recovery Act, and judgment for that amount will be entered in favor of plaintiff. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

THE ERWIN COTTON MILLS COMPANY, A CORPORATION, v. THE UNITED STATES

[No. 44356. Decided November 1, 1943]

On the Proofs

Increased labor costs under National Industrial Recovery Administration Act.—Under the jurisdictional act of June 25, 1938, recovery for increased labor costs is conditioned on the incurring of such costs as the result of the enactment of the National Industrial Recovery Administration Act rather than on strict compliance with the code for the industry involved.

The Reporter's statement of the case:

Mr. Fred B. Rhodes for plaintiff.
Rhodes, Klepinger & Rhodes on the brief.
Mr. Currell Vance, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

The court made special findings of fact as follows:

April 22, 1933, plaintiff, a North Carolina corporation, entered into Contract W–669–qm–4628 with defendant for furnishing certain bleached cotton sheets to the War Department, and May 9, 1933, plaintiff entered into Contract No. 31308 with defendant for furnishing bleached cotton sheets to the Navy Department. These contracts have been fully performed by plaintiff and it has been paid the contracts' prices in full.

Plaintiff's bids embodied in the contracts were based upon rates of wages and hours of labor in effect at the time of its bids. Thereafter it became bound by the provisions of the Code of Fair Competition for the Cotton Textile Industry, which became effective July 17, 1933. Pursuant to the provisions of this Code, plaintiff shortened its hours and raised its wages in order to conform therewith. As a result of plaintiff's compliance with the Code of Fair Competition, it incurred increased costs of labor employed in the performance of the involved contracts as follows:

Contract W-669-qm-4628	$3,564.86
Contract No. 31308	506.98

These increased costs, totaling $4,071.84, were incurred and paid as a result of enactment of the National Industrial Recovery Act, approved June 16, 1933.

Plaintiff filed timely claims for increased labor costs of performance of the involved contracts under the provisions of the Act of June 16, 1934, Public No. 369 (48 Stat. 974), and within the time provided thereby. The claims were disallowed by the Comptroller General.

Plaintiff, after becoming subject to the provisions of the Code of Fair Competition for the Cotton Textile Industry, did not conform to the wage and hour requirements of said Code in its bleaching and finishing departments, contending that such requirements were not applicable to such bleaching operations. The Comptroller General held that plaintiff was in this respect in error and, for such reason, denied plaintiff's entire claim under Contract W-669-qm-4628 presented pursuant to the Act of June 16, 1934, solely because of lack of strict compliance.

The court decided that the plaintiff was entitled to recover, in an opinion *per curiam*, as follows:

The facts show without dispute that the increased labor costs of $4,071.84 sought to be recovered in this case under the Act of June 25, 1938, 52 Stat. 1197, were incurred as a result of the enactment of the National Industrial Recovery Act and compliance, to the extent of such labor costs, with the Code for the Textile Industry. The Comptroller General denied plaintiff's claim for the increased labor

costs incurred under Contract W-669 solely on the ground that there had been a failure of strict compliance with the hours-of-work provision of the Textile Code, as he interpreted it, in the bleaching department of plaintiff's mill. There had been a controversy as to whether the original Code applied to finishing- or bleaching-operations department, and the matter was not cleared up until November 5, 1933, after this contract had been completed, and an amendment to the Code was issued and made effective November 13, 1933. The question whether the Comptroller was right in his interpretation of the Act of June 16, 1934, and the original Textile Code is immaterial here since the Act of June 25, 1938, under which this suit is brought, conditions the right to recover on the incurring of increased costs as a result of the enactment of the National Industrial Recovery Act rather than on strict compliance with a code. The facts as stipulated show without doubt that the increased costs of $4,071.84 claimed were incurred as a result of the enactment of the National Recovery Act. Judgment will therefore be entered in favor of plaintiff for $4,071.84. It is so ordered.

JUDGMENTS ENTERED UNDER THE ACT OF JUNE 25, 1938

In accordance with the provisions of the Act of June 25, 1938 (52 Stat. 1197), and on motion of the several plaintiffs (to which no objection had been filed by the defendant), and upon the several stipulations by the parties, and in accordance with the report of a commissioner in each case recommending that judgment be entered in favor of the respective plaintiffs in the sums named, it was ordered that judgments be entered as follows, for increased costs under the National Industrial Recovery Administration Act:

ON OCTOBER 4, 1943

No. 44243.	General Steel Castings Corporation	$6,028.74
No. 44350.	Continental Clay Products Company, a Corporation	916.64
No. 44372.	Batavia Mills, Inc., a Corporation	907.37
No. 44412.	Dahlstrom Metallic Door Company, a Corporation	4,518.24
No. 44478.	Allis-Chalmers Manufacturing Company, a Corporation	12,125.96
No. 44518.	J. L. Shiely Company, a Corporation	1,303.93

ON NOVEMBER 1, 1943

No. 44249. Cramerton Mills, Inc 8,383.24
No. 44271. H. C. Lemke et al 1,180.95

ON DECEMBER 6, 1943

No. 44335. Atlantic Elevator Company, Inc 301.11
No. 44349. The Marble & Shattuck Chair Company, a Corporation 17,576.27
No. 44375. J. K. Rishel Furniture Company 591.18
No. 44525. American Engineering Company 1,035.75

ON JANUARY 3, 1944

No. 44248. John J. Murphy & Co., Inc 2,609.62

PETITIONS DISMISSED

Cases under the Act of June 25, 1938, in which petitions were dismissed:

ON NOVEMBER 1, 1943

44292. Jay DePuy.
44378. The William Bayley Co.
44506. Frederick E. Toebe, Admr.

ON DECEMBER 6, 1943

44143. The American Shade Cloth Co.
44342. Harry F. Fisher, Receiver.
44371. Sulloway Hosiery Mills, Inc.

ON JANUARY 3, 1944

44557. Barker Painting Company.
44562. The Simes Company.

CASES DECIDED

IN

THE COURT OF CLAIMS

OCTOBER 1, 1943, TO JANUARY 31, 1944

INCLUSIVE, IN WHICH, EXCEPT AS OTHERWISE INDICATED, JUDGMENTS WERE RENDERED WITHOUT OPINIONS

No. 45553. OCTOBER 4, 1943

Milton H. Frankfurt, as Trustee in Bankruptcy of the Estate of Cincotti Trucking & Contracting Co., Inc., Bankrupt.

Government contracts for use of equipment, personnel, and materials on W. P. A. projects.

In this case a stipulation was filed by the parties in which it was stated, among other things, that

> 4. Included in the claims of the plaintiff aggregating $116,196.06, are various charges aggregating $10,381.34, which are not proper charges against the defendant.
>
> 5. The defendant, pursuant to vouchers submitted by the Corporation, paid to the Corporation various amounts which were $14,292.45 in excess of the amounts properly due.
>
> 6. The Corporation is indebted to the defendant in the amount of $6,070.77 for unpaid taxes.
>
> 7. The Corporation and its president were indicted and convicted of practicing and attempting to practice a fraud against the United States under Contract ER–Tps–21–12985. Included in the claims made the subject of this suit are claims aggregating $10,481.71 for equipment, personnel, and materials furnished under this contract. These claims, because of the fraud, are forfeited to the United States.
>
> 8. Upon the conviction mentioned in paragraph 7, a fine of $10,000 was duly imposed upon the Corporation. This fine is unpaid.
>
> 9. Pursuant to vouchers submitted by other corporations owned and operated by the same persons as owned

and operated the Cincotti Trucking & Contracting Co., Inc., the defendant paid various amounts which were $2,744.17 in excess of the amounts properly due. In addition, one of these corporations defaulted in a contract with the defendant, resulting in excess costs to defendant of $841.00.

10. The amounts set forth in paragraphs 4 through 9, *supra*, as deductions and claims of the defendant against the plaintiff aggregate $54,811.44.

11. On June 21, 1943, pursuant to an order of the Referee in Bankruptcy authorizing such action, the plaintiff submitted an offer to compromise its claim for the sum of $30,692.31, if the United States would make no further claims for the taxes and fine mentioned in paragraphs 6 and 8, *supra*, and would not participate in any distribution of the settlement funds. Said offer of compromise was, on July 15, 1943, accepted by the Attorney General. The plaintiff hereby waives and abandons any and all other claims upon the defendant touching any and all matters involved in this case, and agrees to accept said amount in full settlement thereof, and the defendant consents to the entry of judgment in said amount.

12. This stipulation is entered into as a basis for an entry of judgment in favor of the plaintiff and against the defendant in the sum of $30,692.31 in the event the Court shall accept this stipulation in its entirety. * * *

On plaintiff's motion for judgment and upon report by a commissioner of the court recommending that judgment be entered in favor of plaintiff in the amount set forth in the above stipulation, it was ordered that judgment for plaintiff be entered in the sum of $30,692.31.

No. 44804. OCTOBER 4, 1943

United States Fireproofing, Company.

Government contract; delay.

On plaintiff's motion for judgment, and upon a stipulation by the parties showing that said parties had agreed to a settlement in the sum named, and upon a report from a commissioner of the court recommending that judgment be entered in favor of the plaintiff in the sum of $1,683.75, judgment was entered for the plaintiff for $1,683.75.

No. 45785. OCTOBER 4, 1943

Susquehanna & New York Railroad Co., a Corporation.

Government contract; fair value of certain railroad materials requisitioned by the defendant.

Upon plaintiff's motion for judgment, and upon a stipulation by the parties showing that said parties had agreed to a settlement in the sum named, and upon a report from a commissioner of the court recommending that judgment be entered in favor of the plaintiff in the sum of $21,095.96, judgment was entered for the plaintiff for $21,095.96.

No. 43034. OCTOBER 4, 1943

Pennsylvania Airlines, Inc.

Air mail contracts; agreement by operators; annulment under section 3950, Revised Statutes.

Following the decision in United Air Lines Transport Corporation, No. 43032, and allied cases Nos. 43029, 43030, 43031, and 43032 (98 C. Cls. 638), and upon plaintiff's offer to compromise the claim on the basis of the pay for air mail transportation earned but unpaid at the time of cancellation and the entry of judgment dismissing the defendant's counterclaim; and upon agreement of the parties to such settlement; and upon a report of a commissioner of the court as to the amount due in accordance therewith and recommending that judgment be entered for the plaintiff in the sum of $24,109.20 and that judgment be entered dismissing defendant's counterclaim; it was ordered October 4, 1943, that judgment for the plaintiff be entered for $24,109.20 and that the defendant's counterclaim be dismissed.

No. 45610. OCTOBER 4, 1943

Jeanette Estell Kaye, Receiver of the Cincotti Construction Company, Inc.

Government contract; rental of equipment, personnel and material.

Upon plaintiff's motion for judgment, and upon a stipulation by the parties showing that said parties had agreed to a settlement in the sum named, and upon a report from a

commissioner of the court recommending that judgment be entered in favor of the plaintiff in the sum of $18,500, judgment was entered for the plaintiff for $18,500.

OCTOBER 4, 1943

No. 45589. *Frieda Vocke McGill, Individually and as Executrix of the Last Will of D. P. Doak, Deceased.*
No. 45590. *Dudley Moulton and Chandler Wolcott Burbrow.*

Flood control; taking of private property for public use.

Defendant's demurrers sustained and petitions dismissed in an opinion *per curiam*, as follows:

> These cases are presented on demurrers. The facts disclosed by the petitions are similar in all respects to the facts in the case of the *Pitt River Power Company* v. *The United States* in which the demurrer was sustained and the petition dismissed and in which certiorari was denied by the Supreme Court, 98 C. Cls. 253, 319 U. S. 747. The demurrers in the instant case are sustained and the petitions are dismissed. It is so ordered.

No. 42927. NOVEMBER 1, 1943

Michele G. DeSimone.

Infringement of patent (No. 1,476,804) on denominator and adding machines purchased by the United States.

Upon plaintiff's motion for judgment (to which the defendant filed no objection), following a stipulation entered into by the parties, showing an offer of settlement by the plaintiff, on November 1, 1943, judgment was entered for the plaintiff in the sum of $2,975.00 plus interest of 4 per cent per annum from July 22, 1931 to date of entry of judgment.

No. 33642. NOVEMBER 8, 1943

Marconi Wireless Telegraph Company of America.

Patents; improvements in wireless telegraphy; validity and infringement; Lodge Patent #609,154.

Opinion, April 6, 1942, 99 C. Cls. 1, awarding just and reasonable compensation, upon commissioner's report as to accounting, on the basis of the special findings of fact and opinion filed November 4, 1935 (81 C. Cls. 671), in which it

was held that the Lodge patent #609,154 was valid as to claims 1, 2 and 5 and had been infringed by the Government.

Affirmed in part and vacated in part by the Supreme Court June 21, 1943, 320 U. S. 1, 99 C. Cls. 815, and case remanded to the Court of Claims for further proceedings not inconsistent with the opinion of the Supreme Court.

Upon the filing of a stipulation by the parties the following order was entered November 8, 1943:

ORDER

This case comes before the court on the stipulation of the parties filed November 5, 1943, and signed on behalf of the plaintiff by Richard A. Ford and Abel E. Blackman, Jr., and on behalf of the defendant by Attorney General Francis Biddle and Assistant Attorney General Francis M. Shea, in which, among other things, it is stipulated and agreed, as a basis for the entry of judgment by the Court of Claims, that

Whereas "on November 1, 1943, the plaintiff offered to compromise all its claims in this case for (a) $34,827.70 with simple interest thereon at 5% per annum from August 16, 1915, to date of payment of the judgment (being the reasonable and entire compensation allowed by the Court of Claims in that part of its judgment of April 6, 1942, as to which the Government sought no review), plus (b) $10,746.23 with simple interest at 5% per annum from May 27, 1919, to date of payment of the judgment (being equivalent to one-quarter of the amount allowed by the Court of Claims in its judgment of April 6, 1942, on account of claim 16)," and that "on November 3, 1943, this offer was accepted by the Attorney General;" and, further, that "the plaintiff hereby waives and surrenders such part of the total of all its claims for the alleged infringement of the patents in suit as is in excess of the total amount stipulated" herein; and this stipulation being subject to the approval of the court, and the court hereby approving the settlement—now, therefore,

It is ordered this 8th day of November, 1943, that judgment be and the same is entered for plaintiff in the sum of forty-five thousand five hundred seventy-three dollars and ninety-three cents ($45,573.93) with simple interest at five per cent per annum on $34,827.70 from August 16, 1915, and on $10,746.23 from May 27, 1919, both to date of the payment of the judgment herein.

No. 45636. DECEMBER 6, 1943

Edward C. Knouse.

Government contract.

Upon a stipulation by the parties and report from a commissioner of the court recommending that judgment be entered in favor of the plaintiff in the sum of $2,000.00, and on plaintiff's motion for judgment, which was allowed, judgment for plaintiff was entered for $2,000.00.

No. 45036. JANUARY 3, 1944

Paul A. Floersch, Administrator of the Estate of Walter Petersen, Deceased.

Government contract; construction of Post Office building.

Upon a stipulation filed by the parties, and upon a report from a commissioner of the court recommending judgment in the sum named therein; and upon plaintiff's motion for judgment, to which the defendant filed no objection; judgment for the plaintiff was entered in the amount of $881.01.

CASES DISMISSED BY THE COURT OF CLAIMS ON MOTION OF PARTIES, OR BY THE COURT FOR NONPROSECUTION

Cases Pertaining to Refund of Taxes

ON OCTOBER 4, 1943

44596. Crystal Corporation.
44597. Trece Laboratories, Inc.
45413. The Manhattan Shirt Company.
45695. Northern Ohio Power and Light Company.
45751. The Sellmayer Packing Company.
45768. Pacific Southwest Realty Company.
45870. The Commercial National Bank and Trust Company of New York.

ON NOVEMBER 1, 1943

45288. Columbus and Zenia Railroad Company, a Corporation.

ON DECEMBER 6, 1943

45319. Louis Rose Company.
45508. Oscar Heineman Corporation.
45532. Powers & Company (Illinois).
45533. Powers & Company (Delaware).
45639. Woodstock Trading Corporation.
45820. Robert D. Brewster et al.

ON JANUARY 3, 1944

45252. John H. Leavell.
45606. Higginbotham-Bailey-Logan Co.

ON FEBRUARY 7, 1944

46042. Robert S. Barlow.

Cases Involving Pay and Allowances

ON OCTOBER 4, 1943

45627. Peter C. Bullard.
45628. Phillip S. Gage.

ON DECEMBER 6, 1943

45614. Frederick L. Oliver.
45715. Folke Becker.
45742. William B. Dell.

ON JANUARY 3, 1944

45699. William Jaffa.

Cases Pertaining to Government Contract

ON OCTOBER 11, 1943

45676. Irving Levine.

ON NOVEMBER 1, 1943

45410. Standard Surety & Casualty Company of New York, etc.

45789. Libby, McNeill & Libby.

ON DECEMBER 6, 1943

43830. John Schmoll, Assignee.

45507. Leslie L. LeVeque et al.

45621. Silas Pembroke Whitney et al.

ON JANUARY 3, 1944

45686. Edward Pious, et al., Receivers.

Cases Involving Infringement of Patents

ON JANUARY 3, 1944

45330. John Hays Hammond et al.

45332. John Hays Hammond et al.

Cases Involving Indian Claims

ON DECEMBER 6, 1943

C–531 (13). The Sioux Tribe of Indians.
C–531 (14). The Sioux Tribe of Indians.
H–211. Saginaw, Swan Creek and Black River Band of Chippewa Indians.

Miscellaneous

ON DECEMBER 6, 1943

45782. Point Wharf Oyster Co., Inc.

ON JANUARY 3, 1944

45526. Lehigh County Agricultural Society.

REPORT OF DECISIONS

OF

THE SUPREME COURT

IN COURT OF CLAIMS CASES

WILLIAM W. McGREGOR v. THE UNITED STATES

[No. 43693]

PERRY SHILTON v. THE UNITED STATES

[No. 43695]

LOUIE HESS v. THE UNITED STATES

[No. 43664]

JACK WADE v. THE UNITED STATES

[No. 43665]

OWEN BUSCH v. THE UNITED STATES

[No. 43666]

[98 C. Cls. 638; 320 U. S. 736]

Personal injury; evidence held not establishing negligence on the part of defendant's agent.

Decided December 7, 1942; petitions dismissed; plaintiffs' motions for new trials overruled March 1, 1943.

Plaintiffs' petitions for writs of certiorari *denied* by the Supreme Court October 11, 1943.

LAWRENCE M. WILLIAMS, AS LIQUIDATOR OF STERLING SUGARS, INC., FORMERLY A LOUISIANA CORPORATION, STERLING SUGARS SALES CORP., AND STERLING SUGARS, INC., A DELAWARE CORPORATION, v. THE UNITED STATES

[No. 45050]

LAURENCE M. WILLIAMS, AS LIQUIDATOR OF STERLING SUGARS, INC., FORMERLY A LOUISIANA CORPORATION v. THE UNITED STATES

[No. 45654]

[99 C. Cls. 203; 320 U. S. 750]

Floor stocks tax under Agricultural Adjustment Act, as amended.

Decided February 1, 1943; plaintiff not entitled to recover for floor stocks taxes on sugar which were passed on to the vendees and not refunded, and entitled to recover for floor stocks taxes paid on cotton bags and not passed on to vendees but absorbed by plaintiff. Plaintiff's motion for new trial overruled May 3, 1943.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court October 11, 1943.

INSULAR SUGAR REFINING CORPORATION v. THE UNITED STATES

[No. 45062]

[99 C. Cls. 345; 320 U. S. 750]

Floor stocks tax imposed by Agricultural Adjustment Act, recovery of; sufficiency of evidence to show tax not passed on.

Decided April 5, 1943; petition dismissed. Plaintiff's motion for new trial overruled June 7, 1943.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court October 11, 1943.

THE UNITED STATES, PETITIONER, v. HOWARD C. MYERS

[Supreme Court No. 142]

[Court of Claims No. 43671]

THE UNITED STATES, PETITIONER, v. JOHN H. ARBLE

[Supreme Court No. 143]

[Court of Claims No. 43672]

THE UNITED STATES, PETITIONER, v. CHARLES C. MARTIN

[Supreme Court No. 144]

[Court of Claims No. 43673]

THE UNITED STATES, PETITIONER, v. WALTER O. PLITZ

[Supreme Court No. 145]

[Court of Claims No. 43674]

THE UNITED STATES, PETITIONER, v. GEORGE H. SPITZ

[Supreme Court No. 146]

[Court of Claims No. 43675]

[99 C. Cls. 158; 320 U. S. 561]

On writs of certiorari to review judgments of the Court of Claims, February 1, 1943, that claimants, customs inspectors at the port of Detroit from September 1, 1931, to August 31, 1937, were entitled to extra compensation, as fixed by the Act of 1911, as amended by the Act of 1920, for services performed between the hours of 5 o'clock p. m. and 8 o'clock a. m. or on Sundays or holidays, and that the Government is liable for such extra compensation. 99 C. Cls. 158.

The judgment of the Court of Claims in each case was reversed in part and affirmed in part, January 3, 1944, and "the proceeding remanded to the Court for determination of the claim of the inspectors in accordance with this opinion." 320 U. S. 561.

Mr. Justice REED delivered the opinion of the Supreme Court, holding:

1. The statutes providing for extra compensation to customs inspectors for overtime services at night create an obligation on the part of the United States to pay such compensation irrespective of the statutory provision requiring payment to the United States by those who, by special license, procure such services; and such payment by the United States is "extra compensation" over and above the annual salary and is not dependent upon the collection of such extra compensation from the licensees.

2. The legislative history of the statutes relating to extra compensation for customs inspectors clearly discloses the intention of Congress to allow extra compensation only when there are overtime services in the sense of work hours in addition to the regular daily tour of duty without regard to the period within the 24 hours when the regular daily tour is performed.

3. The statute, section 5, 41 Stat. 402 (U. S. Code, Title 19, section 267) authorizing the collector to use the "shift" system in the assignment of customs inspectors in those ports where the customary hours are other than 8 a. m. to 5 p. m. so as to make their hours conform with the daily working hours in such ports, gave the collector authority to assign inspectors to 8-hour duties within a 24-hour period so as to secure 24-hour service without extra compensation.

4. "Overtime", used in the statutes as applied to weekdays, refers to hours longer than the daily limit of 8 a. m. to 5 p. m., nine hours with one hour for food and rest; and these tours of duty are movable within the 24-hour period in accordance with prevailing working hours and the requirements of the service, so that the inspectors whose tours of duty are performed at night are not on that account entitled, under the provisions of section 5 of the Act of February 13, 1911, as amended, and sections 401, 450 and 451 of the Tariff Act of 1930, to extra compensation over and above their annual salaries, but such statutory provisions have reference only to hours longer than the daily limit.

5. Extra compensation for work on Sundays and holidays is contemplated by the statute (section 5) which provides that extra compensation shall be paid to inspectors "who may be required to remain on duty between the hours of 5 o'clock p. m. and 8 o'clock a. m. or on Sundays or holidays", since if inspectors working on Sundays and holidays were not to receive extra compensation without regard to whether services on those days were overtime, there would have been no occasion to add Sundays and holidays to the overtime.

6. Services of customs inspectors at a bridge or tunnel are within the provision for overtime compensation for services on Sundays and holidays made by section 5 of the Act of February 13, 1911, as amended, in view of the expansion of the section's application by section 401 of the Tariff Act of 1930 (46 Stat. 590, 708) to include among the instrumentalities of foreign commerce every contrivance capable of being used as a means of transportation on land or water, and the provision of sections 450 and 451 of such Act for unlading by special license on Sundays and holidays and for extra compensation of customs inspectors by the licensee.

7. In awarding extra compensation to customs inspectors for overtime services, the United States was not entitled to credit for that part of the base pay received for such services, since the intention to give extra compensation precludes such a claim, and hence customs inspectors in addition to their regular salaries for weekdays are entitled to statutory additional pay for overtime, Sundays and holidays.

Mr. Chief Justice STONE was of the opinion that the judgment should be reversed in its entirety and the suits dismissed.

CHARLES E. LEYDECKER v. THE UNITED STATES

[No. 45299]

[97 C. Cls. 711; 320 U. S. 796]

Pay and allowances; bachelor officer in U. S. Army with dependent mother.

Decided December 7, 1942; plaintiff entitled to recover. Plaintiff's motion to vacate judgment entered April 5, 1943,

and to obtain further information from the General Accounting Office was overruled April 28, 1943.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court December 13, 1943.

SEA GULL LUBRICANTS, INC., AN OHIO CORPORATION (TO THE USE OF THE NATIONAL ACME COMPANY AND THE LAMSON & SESSIONS COMPANY, OHIO CORPORATIONS) v. THE UNITED STATES

[No. 45081]

[99 C. Cls. 716; 321 U. S.]

Excise tax on lubricating oils applicable to cutting oils; process of lubrication; intent of Congress; discrimination; constitutionality.

Decided June 7, 1943; petition dismissed. Plaintiff's motion for new trial overruled October 4, 1943. Opinion 99 C. Cls. 716.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court February 28, 1944.

UNITED STATES LINES OPERATIONS, INC. v. THE UNITED STATES

[No. 42833]

[99 C. Cls. 744; 321 U. S.]

Transportation charges; discount provided in published tariff rates for round-trip sailings in off-season; Government entitled to rates charged to public; counterclaim; extension of lease by consent; hold-over tenancy on month-to-month basis.

Decided June 7, 1943; plaintiff's petition dismissed and defendant entitled to recover on its counterclaim. Plaintiff's motion for new trial overruled October 4, 1943. Opinion 99 C. Cls. 744.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court February 28, 1944.

INDEX DIGEST

ARMY OFFICER, CONVICTION OF.

I. Conviction of Army officer of violation of section 203, Title 18, United States Code, operated to remove him immediately and permanently from his office, although the judgment of conviction was appealed from, and on that appeal, was reversed. *McMullen, 323.*

II. The statutory penalty of removal from office for violation of section 203, Title 18, U. S. Code. is applicable to an Army officer on the retired list as well as to an officer on active duty. *Id.*

III. The years during which an Army officer was on the retired list may not be included to make up the required 40 years for retirement within the meaning of the Act of June 30, 1882 (U. S. Code, Title 10, section 942). *Id.*

IV. While a retired officer or soldier is, for some purposes, in the military service (*United States* v. *Tyler*, 105 U. S. 244; 16 C. Cls. 223, affirmed), he is not in the service within the meaning of section 942, Title 10, United States Code. *Id.*

V. Appointment by the President, and confirmation by the Senate, of a successor to an Army officer who had been separated from the service by conviction of violation of section 203, Title 18, U. S. Code, operated as an effective removal from office, although the judgment of conviction was later reversed. *Id.*

VI. The Supreme Court has repeatedly held that the "tenure of office" statutes, enacted by Congress during its controversy with President Johnson about Reconstruction policy, do not prevent the removal of an officer by the joint action of the President in appointing his successor and the Senate in ratifying the appointment. See *Blake* v. *United States*, 14 C. Cls. 462; affirmed 103 U. S. 227; and *Wallace* v. *United States*, 55 C. Cls. 396; affirmed 257 U. S. 541. *Id.*

CONTRACTS—Continued.

XVI. Where the contract drawings specified a tin roof, which contractor installed, under the supervision of the construction engineer, after a sample of the tin had been submitted to the supervising architect and approved by him; and where later upon a report of a travelling inspector the supervising architect reversed his previous interpretation of the plans and specifications and required contractor to remove the tin roof and replace it with copper, which the contractor did under protest; plaintiff is entitled to recover. *Id.*

XVII. The interpretation of the plans and specifications by the contracting officer is final and conclusive under the provisions of the Standard Government Construction Contract, but there is nothing in the contract or specifications that gives the contracting officer the right to reverse his ruling after the work has been done in accordance with the original instructions of the contracting officer. *Id.*

XVIII. Where Invitation for Bids and Specifications put contractor on notice to investigate the conditions existing in the river bed to be dredged, and where defendant gave plaintiff such information as it had, there was no misrepresentation of conditions by the defendant. *Huffman Construction Co.*, 80.

XIX. It is a prerequisite to plaintiff's right to an equitable adjustment under Article 4 of standard Government contract that it appear that conditions at the site were materially different from those shown on the drawings or indicated in the specifications. *Id.*

XX. In determining whether or not conditions at site of work were different from those shown on the drawings or indicated by the specifications, the findings of fact of the contracting officer as to the conditions actually encountered are final and conclusive if not arbitrary or grossly erroneous. *Id.*

XXI. Where specifications stated materials to be removed were believed to be sand and clay "with some hardpan and boulders" and where the hardpan actually removed was 11 percent of the total materials removed, conditions actually encountered did not materially differ from those

CONTRACTS—Continued.

XXXII. Where the contracting officer admitted there had been a slowing up of the work on Government building but stated he did not have knowledge as to the cause of the delay in completion, such statement was not a finding that defendant was responsible therefor. *Id.*

XXXIII. Where in connection with the contract for the construction of a Government building, plaintiff, contractor, submitted a proposal as to cost of certain additions which the contracting officer acknowledged were extra work, which work was performed; and where the contracting officer rejected the claim for payment for such extra work solely on the ground that payment could not be made under Section 320 of the Economy Act of June 30, 1932 (47 Stat. 382, 412); and where it is not denied that plaintiff was entitled under the contract to the additional compensation claimed; it is *held* that the contracting officer's rejection of plaintiff's claim, on the grounds stated, was not an interpretation of the drawings or specifications but a construction of the statute, as to which neither the contracting officer nor the head of the department was the final arbiter. *Id.*

XXXIV. Whether Section 320 of the Economy Act barred plaintiff from receiving additional compensation for admittedly extra work was neither a question of fact nor a dispute "arising under this contract"; and the decision of the contracting officer thereon is not binding on the contracting parties nor on the court. *Id.*

XXXV. Where plaintiff, contractor, appealed from adverse decision of the contracting officer to the head of the department, who considered plaintiff's appeal, sustained its contention and reversed the decision of the superintendent of construction and contracting officer, and directed plaintiff to submit its claim for extra costs on the regular Government voucher form, supported by a statement of facts, through the office of the superintendent of construction and the contracting officer; and where plaintiff, in accordance with the decision of the head of the department, submitted its voucher as directed, supported by extended findings of fact by the super-

CONTRACTS—Continued.

LIV. Where the contract provided that "no partial payments will be made on work not satisfactorily executed in place;" and where defendant paid the amount computed and asked by plaintiff's superintendent as the payment due for July 1932; it is *held* that there was no breach of the contract by defendant for failure to pay a larger amount covering the installation of new boilers for the heating system which were delivered in July but the installation of which was not completed until later. *Id.*

LV. Where the contract provided (paragraph 683 of the specifications) that "the contractor shall provide adequate heating facilities" in the building throughout any heating season during the life of the contract; and where the contractor installed a temporary heating system, which was used during the heating season; it is *held* that the contractor, under the terms of the contract, was required to furnish and pay for fuel for temporary heat during the period of performance of the contract and plaintiff is not entitled to recover for the amount so expended for fuel. *Id.*

LVI. Where the decision of the contracting officer has substantial support in the language of the contract his decision is final and binding on the contractor, plaintiff, under the provisions of the contract as found in paragraph 38 of the specifications. *Id.*

LVII. It is the general rule that public charity hospitals are not liable to patients for the negligence of their agents even if the patients pay for the service rendered. *Powers* v. *Massachusetts Homeopathic Hospital*, 109 Fed. 294, cited. *Cora Washington*, 491.

LVIII. In the instant case it is not to be implied that the hospital agreed to a greater degree of liability than the law imposed on public charity hospitals generally. *Id.*

LIX. Where the plaintiff's child, born at Freedmen's Hospital, a Government institution, was "surreptitiously and criminally taken" from the hospital and where it is stipulated by the parties that the child was taken "by an unknown person or persons without the permission or knowledge or negligence of any of the Hospital's officers, agents, or employes;" it is *held* that the defend-

"FLYING OFFICER."

The expression "nonflying officer" as used in the Appropriation Act of April 26, 1934 (48 Stat. 614, 618), in the absence of any indication that Congress had in mind any other meaning, may be interpreted in accordance with the definition of a "flying officer" given in Section 2 of the Act of July 2, 1926 (44 Stat. 780, 781), which provided that "wherever used in this Act a flying officer in time of peace is defined as one who has received an aeronautical rating as a pilot of service types of aircraft." *Baker*, 212.

FRAUD.

I. "Misstatements" alleged to have been made by plaintiffs in connection with vouchers for goods sold, previously presented by plaintiffs to the Government and duly paid, do not constitute fraud within the contemplation of section 1086 of the Revised Statutes where such alleged "misstatements" were not made for the purpose of securing the payment of the claim in suit but were made, if at all, with reference to another, previous transaction. *Crovo*, 368.

II. Although it is not necessary to show a pecuniary loss to defeat a fraudulent claim, under section 1086 of the Revised Statutes, it is necessary to show such loss when a claim has been paid and an action is brought to recover the amount paid; and in such case recovery can be had only to the extent of the pecuniary loss sustained. *Charles* v. *United States*, 19 C. Cls. 316, distinguished. *Id.*

III. In order to sustain a plea of set-off for fraud committed in connection with a prior transaction, it is necessary to show a pecuniary loss was sustained by the commission of the fraud. *Id.*

SPECIAL JURISDICTIONAL ACT INVALID—Continued.

VII. While it has not been argued in the instant case that the doctrine laid down by the Supreme Court in the case of *Williams* v. *United States*, 289 U. S. 555, has any important bearing upon the question presented in the instant case, nevertheless the language of the Supreme Court in the *Williams* case, and the fact that the language was uttered in the course of a decision of a case certified to the Supreme Court by the Court of Claims, would seem to leave no room for doubt that the Court of Claims is a court in fact as well as in name, and that its decisions are judicial decisions. *Id.*

VIII. If the Court of Claims were not a court the Supreme Court would not review its decisions, as it does, and as it has done since the amendment, in 1866 (14 Stat. 9), of the statute defining the jurisdiction and powers of the Court of Claims. (*United States* v. *Jones*, 119 U. S. 477.) *Id.*

IX. When the Court of Claims decides its cases in the first instance the court is no more acting as a mere agent or arm of the Legislature than is the Supreme Court when it, under the appellate procedure prescribed in the statute, decides them finally. (U. S. Code, Title 28, section 288.) *Id.*

X. If the Congressional mandate contained in section 2 of the Special Act under consideration is valid and should be followed by the Court of Claims, it would equally, it would seem, be binding upon the Supreme Court upon certiorari, also provided for under section 4 of the same act. *Id.*

XI. In the case of *Pocono Pines Assembly Hotels Co.* v. *United States*, 73 C. Cls. 447, all members of the court were of the opinion that an act which merely granted a new trial would be unconstitutional if its effect was to deprive a claimant against the United States of a judgment which he had recovered, though the members of the court differed in their views as to whether the act there in question did grant a new trial. *Id.*

XII. An act directing the court to re-try the issues of a case, which issues were or should have been tried the first time, would, regardless of whether the Government or the plaintiff sought the new trial, be no less dangerous to the independence of the court as a judicial body than a direction

TAXES—Continued.
Income Tax—Continued.

1937 by plaintiff under the deferred payments provision of the sale agreement were profits on the sale of a capital asset held more than 5 years and not income. *Haynes.* 43.

II. (2) The monthly payments were the fulfillment of the purchaser's promise to pay rather than the product of property which plaintiff and the other stockholders owned. *Id.*

III. (3). Plaintiff and the other stockholders became unsecured creditors of the purchaser and retained no property interest in either the leases or the wells. *Helvering* v. *O'Donnell*, 303 U. S. 370, cited. *Thomas* v. *Perkins*, 301 U. S. 655, distinguished. See also *Helvering* v. *Elbe Oil Co.*, 303 U. S. 372; *Helvering* v. *Bankline Oil Co.*, 303 U. S. 362. *Id.*

IV. (4) Where certain items included at cost in plaintiff's closing inventory for the taxable year 1932 were subsequently sold at a loss in the following taxable year; and where plaintiff claimed that said items had become obsolete during the taxable year 1932 and thus required a reduction of its inventory at the end of that year; it is *held* that it has not been shown by sufficient proof that these items became obsolete in the taxable year 1932 or that plaintiff's income was overstated in its tax return for that year and plaintiff is accordingly not entitled to recover. (Revenue Act of 1932; 47 Stat. 169). *Knowlton Brothers*, 457.

V. (5) Notation on tax return "Paid under protest and refund demanded" does not constitute an informal claim for refund which might later be legally amended after the expiration of the limitation statute. *Lincoln Cotton Mill Company*, 507.

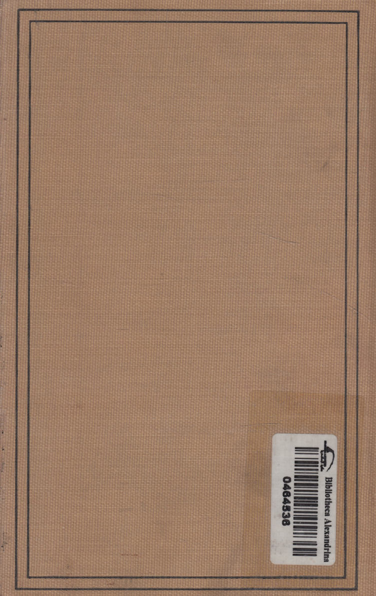
VI. (6) Where on plaintiff's tax return for the taxable year 1935, filed on February 18, 1937, there was inserted in typewriting the statement "Paid under protest and refund demanded;" and where there is no proof that the Commissioner of Internal Revenue or anyone acting in his behalf ever considered the notation on the 1935 tax return as a proper claim for refund, informal or otherwise; and where, thereafter, on July 12, 1940, plaintiff filed a claim for refund on proper










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